

Submission on the “The Australia - ASEAN - New Zealand Free Trade Agreement”, by Alex Malik¹

(1) Introduction

As an academic with a strong focus on intellectual property (“IP”) rights, the bulk of my comments will relate to the intellectual property rights impacts of the proposed Australia - ASEAN - New Zealand Free Trade Agreement” (“FTA”). On the face of it, free trade agreements provide a great opportunity for Australian companies, businesses and investors. The Federal Government has over time explained the benefits to the Australian economy of free trade agreements with New Zealand, Singapore, Thailand and the United States. The Government has focused on the principals of comparative advantage and market access. No doubt, over time the Federal Government will explain the further benefits of the proposed FTA.

However, as an academic with a strong focus on IP rights I have been disturbed by some of the recent trends apparent from the negotiations with our free trade agreement partners, especially the United States. I have also been concerned with the results of these negotiations. I believe these processes and results provide a series of lessons and guiding principals which should be adopted in any negotiations over the proposed FTA.

(2) Avoid additional complexity in IP laws

Recently we have seen a substantial set of legislative changes which have been enacted following the implementation of the United States/Australia free trade agreement. The legislative changes accompanying the United States/Australia free trade agreement, which have focused on IP rights, are very complex and detailed. I found it difficult to understand the impact of all of these legislative changes – especially regarding how they interact with each other.

Would-be licensors and licensees of goods and services with an IP component need clear, simple IP legislation so they are aware of their rights and obligations, and so that they can undertake contractual negotiations in an environment of certainty. Complex laws add to the cost of doing business. So while the proposed FTA is bound to bring with it further legislative changes in the area of IP, I call on the Federal Government to avoid, as far as possible, increasing the complexity of Australia’s IP laws.

(3) Greater time for consultation

In some respects, the IP law changes introduced on January 1, 2005 in association with the United States/Australia free trade agreement seemed to be rushed, and in some instances do not seem to have been entirely thought through. As a result, I call

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the Federal Government to allow a greater period of time for discussion and consultation regarding any proposed changes to IP laws.

(4) Protection from IP rights infringement

Negotiations with ASEAN countries present a unique problem in the area of IP rights compared to prior negotiations with New Zealand, the United States and Singapore. Many ASEAN countries have a history of substantial IP rights infringement.

According to the International Federation of Phonographic Industries (IFPI), “there was a sharp increase in the number of discs seized and pirate lines de-commissioned, mainly in South East Asia and Latin America ... South East Asia, and, to a lesser extent Eastern Europe, are the predominant centres of large-scale factory-pressed pirate music CDs ... Countries in the spotlight where piracy is at a rate of over 25% and notably worsening include ... Thailand. The top five priority countries in terms of domestic piracy levels (include) Indonesia (85%)”.²

Record companies are concerned that excess production capacity in optical disc plants may be used to produce unauthorised CDs. For the owners of CD production plants, allowing illegal CDs to be produced represents a low risk way to earn income during what would otherwise be “down time”.

IFPI has conducted a detailed analysis of worldwide production capacity and found that “the continuing spread of music piracy is global overcapacity in the manufacture of optical discs, i.e. discs carrying all media including music, film and computer software. IFPI estimates that there are approximately 1,000 optical disc plants worldwide. Such increases underline the lack of adequate regulation of optical disc manufacturing. This is a recipe for increasing illegal pirate sales, as supply of discs is far outstripping legitimate demand. For the combined ten territories shown, capacity outstrips local demand by over twenty times.”³

IFPI have produced the following table listing territories, their estimated capacity (all disc formats) and total legitimate demand (all disc formats):

Territory/Estimated Capacity: mil. units/Total Legitimate Demand: mil. units

Taiwan	7600	230
Hong Kong	2700	150
China	2500	700
Malaysia	1600	65
India	800	160
Singapore	720	73
Thailand	500	53
Poland	320	120
Russia	300	70

² See:

- "Governments urged to step up enforcement to stop the damage to cultures, economies and world trade", IFPI Report, June 11, 2002.
- IFPI - Music Piracy, Organised Crime and Terrorism, 3rd edition.
- IFPI Enforcement Bulletin - Issue 14 - March 2002.
- IFPI Enforcement Bulletin - Issue 15 - June 2002.

³ <http://www.ifpi.org/site-content/antipiracy/piracy2003-piacy-statistics.html>.

Indonesia	190	17
Czech Republic	170	37

Obviously these figures include some ASEAN countries. This fear regarding excess production capacity influencing piracy levels seems to have been warranted, based on what we have seen in the past eighteen months internationally. In South East Asia there is an “excess of supply over current legitimate demand for optical disc products in (these and) neighbouring countries. This makes piracy an attractive export business for many infringers. Increasingly, countries which surround Australia are becoming the base for both legal and illegal pressing plants which are capable of producing discs with software many times in excess of the legitimate demands of software owners and purchasers. Armed with the masters used to produce the optical discs, whether containing software, music or film or a combination of them, these plants are capable of vast production runs undetected by the copyright owners. There have been many raids on both legal and illegal plants in Asia in the last 5 years which have demonstrated this threat.”⁴

“Video piracy has exploded into a billion dollar business in Asia ... (it is) controlled by organized gangs and fast-evolving technology that makes copying easier than ever ... in Asia, counterfeit CDs, VCDs and DVDs are openly sold on the street for a fraction of their retail price. A panel of industry experts warned that high profile crackdowns in the region have failed to stop the trade because offenders typically face token penalties.”⁵

“Losses to the worldwide software industry caused by the use of unlicensed software amounted to \$10.97 billion in 2001 ... according to a (BSA) report ... (the) study of software piracy estimates the use of unlicensed software in 85 countries by comparing the amount of legal software supplied to a country with the anticipated demand for software in that country. The difference between the two figures represents the number of unlicensed applications, and multiplying that figure by the average price of business applications gives the estimated dollar loss ... the use of unlicensed software worldwide grew from a rate of 37% in 2000 to 40% in 2001, meaning that four out of every 10 programs used worldwide are unlicensed, BSA says in the study.”⁶

“Asia-Pacific accounted for the largest share of the losses at \$4.7 billion, representing an unlicensed use rate of 54%. Asia contains countries with very high unlicensed use rates such as Vietnam (94%), China (92%), and Indonesia (88%). But New Zealand has one of the lowest rates in the world at 26%, and Australia's rate fell from 33% to 27% during the year.”⁷

Turning to specific ASEAN countries, according to the IIPA⁸ Indonesia has an “optical media piracy problem” involving CD and DVD piracy “that is nothing short

⁴ “Effective IP enforcement strategic approaches to countering software piracy”, by Michael Williams, 2001.

⁵ “Panel Says Video Piracy Thriving in Asia”, Associated Press/ Yahoo News, December 3, 2002.

⁶ “Losses to the worldwide software industry”, David Legard, IDG News Service, June 10, 2002.

⁷ “Losses to the worldwide software industry”, David Legard, IDG News Service, June 10, 2002.

⁸ The IIPA is a coalition of seven trade associations -- the Association of American Publishers (AAP), AFMA, the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA) -- that collectively represent the U.S. copyright-based industries -- the motion picture, music and recording, business and entertainment software, and book publishing industries -- in bilateral

of astonishing". Losses to the US copyright industries due to piracy in Indonesia reached nearly \$US 175 mil in 2001. Book piracy is a huge problem in Indonesia – especially of English language textbooks, reference books and computer related volumes.

IIPA estimates trade losses due to piracy in Malaysia cost American firms \$316.5 million last year versus \$140 million in 2000.”⁹ IIPA identifies Malaysia as a major producer and supplier of pirated video compact discs (VCDs) to the region and throughout the world. Despite several concrete measures adopted in the past year to reduce the piracy levels, including the passage of new optical disc legislation and numerous raids on street vendors who sell pirated goods, Malaysia continues to be a hub for international piracy. In particular, Malaysia has done little to address wholly inadequate criminal enforcement against copyright infringers.

According to Jack Valenti, the former head of the MPAA, “movie DVD counterfeiting is an acute problem, with criminal gangs operating factories in ... Malaysia and other countries that have weak copyright laws. Large, violent, highly organised criminal groups are getting rich from the theft of America's copyrighted products. Only when governments around the world effectively bring to bear the full powers of the state against these criminals, can we expect to make progress.”¹⁰

The Malaysian government has acknowledged the problem of piracy, but copyright owners were unhappy with their response to the problem. Rather than focusing on education, “the Malaysian government has blamed high prices for fuelling piracy.” The “government had "no choice" but to fix the prices of computer software, CDs, VCDs, and DVDs because of the industries' reluctance to self regulate prices.”¹¹

According to a media report, “Malaysian software pirates¹² are selling copies of the next generation of Microsoft's flagship Windows operating system - years before its official release and at a fraction of the expected price.”¹³ “Compact discs with a version of the system code-named Longhorn are being sold openly for less than 10 ringgit (\$A3.57) per copy in at least one shopping mall in the southern Malaysian city of Johor Bahru, a short drive from neighbouring Singapore. Film, music and software piracy is rampant in some parts of Asia and entertainment and computer companies complain it costs them hundreds of millions of dollars in lost revenue. Malaysia is one of the worst offenders, with CDs, CD-ROMs and DVDs sold openly in stores and street stalls and policing patchy, at best. Longhorn is still in development and won't officially be ready until 2005 at the earliest. Microsoft says it will be a breakthrough technology that silences criticism of security holes and other quirks in the current desktop operating system, Windows XP. Authorised, off-the-shelf versions of XP sell for around US\$100.

and multilateral efforts to improve copyright laws and enforcement around the world. See IIPA 2002 Special 301 Report – Indonesia.

⁹ “Malaysia Struggling with Movie Piracy Policy”, Reuters/Yahoo, September 3, 2002.

¹⁰ “Antipiracy allies watch out for the mob”, by Declan McCullagh, Special to ZDNet, 14 March 2003.

¹¹ “Malaysian govt gives 2 week deadline”, By Staff, CNETAsia, July 4 2003.

¹² Software piracy is huge problem in Malaysia according to a Microsoft spokesman. See “Malaysia Has to Do More to Fight Piracy, Microsoft Says”, by Wong Choon Mei, Reuters, February 26, 2004, <http://www.reuters.com/newsArticle.jhtml?storyID=4442893>.

¹³ See “Software pirates flog Windows booty”, AAP, December 3 2003, and “Pirated Longhorn goes on sale”, Sean Yoong, December 3, 2003.

Microsoft Malaysia's corporate lawyer, Jonathan Selvasegaram, said buyers were being duped by the pirates if they thought they were getting a finished copy of the new program. "Our concern lies with customers who may be misguided into thinking that they are purchasing a complete product, which is only targeted to be released in a couple of years' time," Selvasegaram said in a statement ... Selvasegaram said the pirated version of Longhorn could have come from leaked codes on the Internet or a recent conference in Los Angeles, where elements of Longhorn were shown to more than 7,000 developers."¹⁴

The Association of American Publishers has undertaken raids near Malaysian universities, and have seized large numbers of unauthorised reproductions of books.¹⁵

In the Philippines pay television operators are taking channels down from satellite and illegally redistributing the programs to their subscribers.¹⁶

In 2004 Singapore police arrested three men as part of a US led global crackdown on piracy networks that distribute software which has had its copyright protection controls removed.¹⁷

In May 2000, over a 24 hour period, the Motion Picture Association of America (MPAA) assisted the Royal Thai Police in what was (then) the largest series of raids ever against optical disc pirates in Thailand. Four illegal optical disc factories, one stamper replication facility and a factory support centre were raided. This followed two earlier raids in April. The factories raided were housed in an indoor chicken processing area, exotic animal cage compound and a full sized crocodile farm. Equipment seized at the sites included 9 replication lines, 4 printing machines, 75,000 pirate films on VCD and 83 stampers. Titles seized included Romeo Must Die, The Sixth Sense, Mission Impossible, The Thomas Crown Affair, The Lion King and Three Kings. The stamper replication facility appeared to be producing more than 900 stampers per month. A Stamper functions like a "cookie cutter in that it imbeds the video and audio information (the programming) into the optical disc". At the time of the raid, stampers were found of the films Lake Placid, The Matrix and Star Wars - Episode 1.¹⁸

These statistics demonstrate the severity of the problem of IP rights infringement in some ASEAN countries. In negotiating with ASEAN countries the Federal Government may find that some Australian IP rights holders fear that such an agreement may result in increased attempts by pirates based in ASEAN countries to increase their exports to Australia of pirated movies, music, games, books and software. Obviously, any trade agreement with ASEAN countries must maintain customs and other legislation that protect Australian consumers from sub-standard counterfeits and other unauthorised copies of goods with an IP component.

¹⁴ See "Software pirates flog Windows booty", AAP, December 3 2003, and "Pirated Longhorn goes on sale", Sean Yoong, December 3, 2003.

¹⁵ "AAP's New Anti-Piracy Director is Headed to Asia", The Association of American Publishers press 4release, October 24, 2002.

¹⁶ "Piracy scuppers Asia's pay-TV profits", Florence Chong, The Australian, January 9, 2003.

¹⁷ "Singapore Police Arrest Three in Internet Copyright Crackdown", Reuters, http://www.gigalaw.com/newsarchives/2004_04_26_index2.html#108297681663610711.

¹⁸ "Largest series of raids ever against Thailand film pirates: six illegal optical disc operations shut down in one day", Motion Picture Association of America (MPAA) press release, May 5, 2000.

(5) Real harmonisation not just increased protection for IP rights holders

Australia has a proud democratic history – a history based on three levels of government – Federal, State and Local Government. The law making process is an independent process, with the government purporting to make laws to benefit Australians. While this law making process is usually an independent process, occasionally new laws appear to be “foisted” on Australians, as a result of Australia signing international treaties or agreements. The recent Australia/United States Free Trade Agreement is a recent example of this process. As a result of the FTA, several legislative changes in the area of intellectual property took effect on January 1, 2005. For example the term of copyright protection was increased to 90 years.

Intellectual property lawyers and academics describe this process as “harmonisation”, which is the process of making the laws of different countries as alike as possible, so as to encourage greater trade and investment between the countries. In the case of the recent Australia/United States Free Trade Agreement, there was a purported aim to harmonise Australian and United States IP laws.

While harmonisation is a useful and desirable aim, resulting in greater certainty for business, in practice the harmonisation of Australian IP laws has typically resulted in an increase in protection for Australian copyright owners. While increased protection for Australian copyright owners may in itself be a useful aim, sometimes it can shift the balance too far in the favour of copyright “owners” rather than “users”.

For example, one of the key features of US copyright law that has not been picked up under Australian law is the personal use exemption in copyright law.

Many Australian users incorrectly believe that their reproductions of sound recording for personal use are protected by a legitimate backup doctrine. In the 1980s and 1990s they incorrectly believed that they could legally make cassettes compilations of their favourite records or CDs. These “mixtapes” proved very popular in the car. Nowadays, these same consumers (or their children) believe they can buy a blank CDR and burn a CD compilation for their personal use, when they own all of the source recordings on CD. However, these beliefs are incorrect.

In Australia, “there is an express exception for making a back-up copy of software, but the music on your CD is data, not software, for these purposes. Your mates may be thinking of the situation in the United States where there is a kind of copyright equivalent to a law allowing you to grow dope for personal use. The Yanks have express rights for some home recording and swapping of copyright materials under statute, which arose in the VCR days. That was supported by the imposition of a US levy on blank recording media to compensate the copyright owners. Obviously the practice of back-up copies, or mates' tapes, is exceedingly widespread here and no one goes knocking on doors to check for pirated domestic copies of CDs. In the end it's too expensive to track down individual users/pirates.”¹⁹

¹⁹ See “Digital music pirates are in for a hammering”, by Simon Minahan, Sydney Morning Herald, Next, June 24 2002.

In the US, “when you buy a musical recording on compact disc ... the law permits you to make a tape of the recording for your car. You may ... loan it out, even to friends who want to use it to make tapes for their cars. What you can’t do without the copyright owner’s permission is rent the CD out commercially, or broadcast it over the radio, or play it at a concert or in your restaurant, bar or store”.²⁰ This is because in the US, Congress enacted the Audio Home Recording Act of 1992 (“AHRA”).²¹ Under the AHRA, manufacturers and importers of digital audio recording equipment and blank tapes, disks, or other storage media are required to pay 2% of their transfer prices (in the case of digital audio devices) or 3% of their transfer prices (in the case of storage media) into a royalty pool, which is distributed to owners of musical works (1/3rd) and sound recordings (2/3rds).²²

Cynics have suggested that the Australian government is only interested in the harmonisation of IP law when it results in increased protection for IP rights holders. They claim that when the process of harmonisation would result in increased rights for users – such as a personal use exemption, the process of harmonisation is ignored. They point to the recent changes in Australian laws as a result of the Australia/United States Free Trade Agreement which almost universally resulted in an increase in IP rights protection for rights holders.

I suggest that if Australia intends to negotiate a free trade agreement with ASEAN, Australia first needs to develop a comprehensive understanding of IP laws in the ASEAN region. We need to then identify the similarities and differences between ASEAN IP laws and Australian and New Zealand IP laws. Such an analysis must be more than a legal, political and economic analysis. Such an analysis must include an understanding of cultural and sociological differences between ASEAN countries and Australia which underlie these legal differences. Finally, the process of negotiating the terms of a trade agreement must do more than balance the rights of companies, businesses and consumers in these countries. Such a process must also balance the rights of IP rights holders and users. True harmonisation can be achieved, but it must be done delicately. The process of harmonisation must do more than force ASEAN member countries to conform to Australian law, even if Australian law appeared to be forced to conform in many respects to United States law on January 1, 2005.

(6) Conclusion

The Federal Government is to be commended for attempting to create a free trade agreement between Australia, ASEAN and New Zealand. Such an agreement will

²⁰ See “Digital Copyright”, by Jessica Litman, p.6.

²¹ “Under the AHRA, manufacturers of "digital audio recording devices" are required to include technology that prevents serial copying. Manufacturers of these devices and of "digital audio recording media" must pay predetermined royalties into a general fund that is, in turn, distributed to holders of certain copyright interests in music. The quid pro quo under the AHRA is that manufacturers and consumers are granted statutory immunity from suits for copyright infringement. The AHRA provides for full use of consumer audio tape recording technology, while ensuring a royalty stream for rights holders. The legislation grew out of litigation filed by music publishers and songwriters in 1990 against Sony Corporation, which had begun marketing DAT recorders.” See:

- “At impasse: Technology, popular demand and today’s copyright regime”, by Jim Griffin, Founder and CEO Cherry Lane Digital & OneHouse LLC Los Angeles, California, April 2001, and
- “Home Recording Rights Coalition Summary of the Audio Home Recording Act - Title 17, Chapter 10, of the U.S. Code”, 1992.

²² See “Envisioning Copyright Law’s Digital Future”, by Peter S Menell, A Symposium Honouring Judge Jon O Newman’s 30 Years On The Bench forthcoming New York Law Review, 2002, p. 63.

create opportunities for Australian creative and technological based industries. However in order for these opportunities to be maximised the Australian Government must ensure that intellectual property rights legislation does *not* become any more complex. The Federal Government must ensure that any process of harmonisation involves bona fide negotiations involving *all* parties, so that the terms of any final agreement genuinely reflect the views of all parties. However, such a process must not prejudice Australian consumers by opening up the Australian market to dangerous counterfeits from countries with an intellectual property rights infringement problem.