Kluwer Copyright Blog

Future EU-Australia FTA and copyright: what could we expect in the IP chapter?

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It is an exciting time – the European Union (EU) has started the long-awaited negotiations with Australia on a Free Trade Agreement (FTA). What could creative industries expect in terms of the intellectual property chapter, and copyright law in particular? Should Australia be afraid of the EU requiring an additional layer of copyright protection, as was the case with the Australia-US FTA (AUSFTA)?

Is the upcoming Australia-EU FTA relevant for creative industries?

According to official press releases, the EU does not see creative industries as priority areas in their free trade negotiations with Australia. The main trading sectors between the EU and Australia have been machinery and appliances, chemicals, motor vehicles and transport equipment, food and drink, electronic equipment, and metals. They are likely to be the ones that would profit from the FTA the most.

However, creative industry is an important part of the EU economy. According to a recent study, it constitutes 5.3% of the total EU GVA and employs 7.5% of all persons employed in the total economy. Europe has also been the largest exporter of creative industry goods and services around the world (see p130 here), with some sectors contributing to EU exports rather significantly. For instance, goods related to fashion account for 12.3% and high-end industries make up 18% of total EU exports**”**. Unsurprisingly, the European Commission has repeated the need for creative industries to ‘expand international reach’.

One of the areas where creative industries may need government support in promoting trade in creative goods and services are strong and effective intellectual property laws, including copyright. Strong IP rights have been seen by the European Commission as instrumental in ensuring remuneration for actors who participated in the creative process and who invested money into it. The EU is thus keen that its trade partners maintain high copyright protection and enforcement standards.

Copyright chapters in previous EU FTAs

How have EU interests in exporting its creative industries and ensuring high IP protection standards in third countries been reflected in previous free trade negotiations between the EU and its trade partners? Apparently, in the last decade, IP law has played an important role in EU free

trade negotiations. As an example, the EU-Korea FTA, in force since 2011, was the first so-called 'new generation' FTA of the EU. It is the first FTA containing a comprehensive chapter on IP, where the EU advocated for TRIPS+ and even ACTA+ provisions. Although the Korea-EU FTA was not as controversial as the US-Korea FTA (KAFTA) agreement, the EU-Korea FTA contained a few provisions that required modification of Korean copyright laws, including extension of the copyright protection term from 50 to at least 70 years after the death of the author and prohibition of any retransmission of television signals over the Internet. Initially, EU ambitions with regard to the Korea-EU FTA were even higher. For instance, the EU had proposed that Korea legislate a remuneration right for performers and phonogram producers when a phonogram was used for performance in public places such as a pub, café, or restaurant; it also asked for the introduction of the artists resale right. These requirements were abandoned later in the negotiations.

As another example, the EU-Canada FTA (CETA), which was finalized in 2014, was also initially meant to strengthen IP rights in Canada, including copyright. Initial drafts of CETA closely followed the ACTA text that was on the negotiation table at the time. However, the final text was very watered down and the remaining copyright provisions did not require additional protection either by Canada or the EU. This 'failure' by the EU was due to a number of reasons, such as national developments in Canada (copyright reform that was taking place in Canada at the time) and international political developments (rejection of ACTA by the European Parliament).

Taking these two FTAs as examples, two observations about Copyright Chapters in the recent EU FTAs could be made. First, the EU attempts to use free trade negotiations to export its own copyright protection standards, especially in agreements with developed countries. Second, these attempts are successful to varying degrees, and depending on national and international political situations and trading priority areas, FTAs with different countries may end up with different copyright protection standards.

What could be expected from a copyright chapter in the Australia-EU FTA?

Keeping in mind the current EU strategy to negotiate extensive copyright chapters in FTAs with third countries, Australia could expect the EU to require the implementation of TRIPS+ standards in the copyright chapter of the Australia-EU FTA. At the same time, Australia has already undergone extensive review of its copyright laws as a result of the Australia-US FTA (signed on 2004) that set TRIPS+ standards in Australian copyright laws. For instance, Australia protects sound recordings for 70 years after they were first made available, and the retransmission of TV broadcasts over the Internet has been prohibited as a result of AUSFTA. Generally, the EU does not have much else to request.

Intermediary liability and the Australia-EU FTA

The only area that seems to offer some intrigue is intermediary liability. Firstly, due to some failures in drafting, Australia's safe harbor provisions do not apply to a range of commercial internet service providers (ISPs), such as host providers and search engines. Despite repeated efforts to correct this mistake, Australian safe harbors have not been updated to cover these market players and the EU may want to see commercial providers covered by safe harbors. Secondly, new legislation related to filtering obligations on ISPs is currently pending before the European Parliament. If adopted, the EU might be willing to export these new rules to Australia too.

In particular, Article 13 of the proposed Directive on Copyright in the Digital Single Market

introduces filtering duties for ISPs. Essentially, it suggests that it is not sufficient for intermediaries to take down content after being notified. Rather, ISPs have to make sure that unauthorised content 'stays down' by applying appropriate measures such as content recognition and filtering technologies. Despite all criticisms addressed at this proposal, it is still on the political agenda.

If this provision is adopted into EU law, it will be interesting to see whether the EU would try to include it in the copyright chapter of the Australia-EU FTA. As previous experience shows, the EU tends to push for the implementation of EU-like copyright legislation in FTAs, and it is likely that it may want to export rules requiring intermediaries to play a more active role in fighting copyright piracy online. It is certainly unclear whether the Australian government would agree to have such provisions in the FTA. However, this would lead to another interesting political battle among Australian creative industries, IT industries and users on copyright law related to intermediary liability.

The post is based on the presentation made at the symposium *The Australia-European Free Trade Agreement: Intellectual Property, Innovation and Trade in the Age of Brexit***,** Queensland University of Technology, Brisbane 26 July 2018

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