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NSW Society reviews WIPO draft Treaty

The Third Draft Treaty on the Protection of Intellectual Property in respect of Integrated Circuits was forwarded by the Commonwealth Attorney-General's Department to the New South Wales Society for Computers and the Law in March this year for the Society's comments. The Society's response is summarised here.

As the Treaty is now drafted, it protects the "layout-design" of integrated circuits from copying, incorporation in a micro-chip and from importation, sale or distribution by other means.

However, the extent of the exemptions provided in the Treaty to these prohibitions is such that the Society fears the exemptions may negate the protection which the Treaty purports to confer.

The Treaty declares lawful:

(i) the unauthorised copying of a layout-design, if:

(a) the copying is solely for the purposes of teaching or research concerning the layout-design; or

(b) the copying is solely for the purposes of analysis, evaluation or reverse engineering; and

(ii) the incorporation in a micro-chip of a layout-design lawfully copied (by reason of (i) above) and the importation, sale or distribution by other means of copies of such a layout-design, of such a micro-chip or of industrial articles containing such a micro-chip.

The authorisation of copying for reverse engineering purposes follows the approach adopted by the US legislation.

However, there exists in that legislation a requirement that the manufacturer establish a trail of costs outlaid in research before his use of a layout design copied for the purpose of reverse engineering is lawful.

Although this requirement has met with difficulties, it is at least an attempt to acknowledge and protect the development costs expended by the original developer.

The Society is of the view the balance between justice and the advancement of technological and economic progress would be better served by adequately re-

munerating developers for their work.

A further concern of the Society was that it may not be generally understood the exclusive act of "copying the layout-design" was intended to include the copying of part only of a layout-design.

It was therefore suggested the notion of "substantiality" be introduced to the Treaty in the manner similar to the Copyright Act, 1968.

Further, in order to protect the essence of the layout-design, it was suggested that greater emphasis should be placed on the logical interconnections, rather than the mere form of the layout-design. For example, "copying" could be defined as "the reproduction of a substantial part of, or the whole of, the logical interconnections comprising a layout-design".

Subject Matter of Protection

A "layout-design" is defined to mean "the 3-dimensional disposition of the active elements, interconnections and any passive elements of an integrated circuit, in whichever form such disposition is fixed or encoded".

The Society has suggested the word "disposition" be replaced by the word "representation", since the former may be

regarded as referring only to the physical layout, rather than to the logical connections.

Further, it has been suggested that 2-dimensional representations be expressly included within the definition.

Pre-requisites to Protection

A layout-design will not qualify for protection under the Treaty where the layout-design is:

(i) not the result of the creator's intellectual efforts;

(ii) commonplace in the integrated circuit industry at the time of its creation; or

(iii) exclusively dictated by the functions of the integrated circuit to which it is applied.

Registration of the layout-design is not a condition of protection, although it is permissible for any country adopting the Treaty to make protection conditional upon the filing of material which identifies the layout-design and the registration of the proprietor's claim to protection, although a proprietor cannot be obliged to file confidential information.

Term of Protection

The term of protection afforded by the Treaty to a layout-design is ten years from either the date of registration of the proprietor's claim to protection, or the date on which the proprietor first commercially exploits the layout-design, whichever is earlier.

Protection is deemed to cease where a layout-design has not been commercially exploited anywhere in the world within fifteen years of its creation.

The Society was of the view fifteen years was too long and the interest of the community would be better served by decreasing the period of non-exploitation to five years.

The Third Draft Treaty was due to be discussed at the Third Session of the Committee of Experts on Intellectual Property in respect of Integrated Circuits, which was held in Geneva from 27th to 30th April 1987 and the Society is anxiously awaiting the results.

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