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Secretariate to the Expert Panel
Review of the National Information System
Department of Innovation, Industry, Science and Research
By email: innovationreview@innovation.gov.au

Dear Expert Panel,

Submission to Review of National Innovation System

1. Introduction

1.1 Open Source Industry Australia Limited (OSIA) is grateful for the opportunity to make a submission to this review.

1.2 In our view, "innovation" is not an end in itself. Innovation is means to an end, that end being a better life for Australians. An undue focus on innovation preferences the means over the end – an issue foreshadowed in the discussion of the Triple Bottom Line in the call for submissions. For example, a system which produces a massive amount of innovation which no one is permitted to use is a poorer system than one which produces a smaller amount of innovation which is widely implemented. Both of these are poorer systems to one which produces a massive amount of innovation and those innovations are widely implemented. It is this last system that the recommendations in this submission are aimed at achieving. In this submission we use the term "institutional progress" to describe the end of which innovation is a means.

1.3 This submission has three major parts:

(a) an introduction and information about the submission, disclosure and information about OSIA;

(b) recommendations;

(c) some discussion of problems motivating the recommendations.

2. Disclosure Statement and Information About OSIA

2.1 I am a director of OSIA. I make this submission on behalf of that company. OSIA is a

company limited by guarantee established in 2004 to represent the interests of the open source industry in Australia. All of OSIA's members are businesses. OSIA membership comprises mostly SMEs from around Australia, but it also counts large organisations and several multinationals among its membership. All of OSIA's members are copyright owners. The exploitation of copyright is a critical component of the business of all OSIA members, primarily through the exploitation of Free, Libre and Open Source Software (FLOSS). I also run a legal practice based in Sydney.

3. Recommendations

3.1 In order to promote institutional progress the government should:

(a) encourage a re-engineering of the national innovation system to minimise transaction costs involved in implementing, distributing, adopting and using innovations. Minimisation of transaction costs ought as a consequence to reduce opportunity costs of under-utilised innovation;

(b) introduce clear rules reducing risk for industry participants. Strict liability provisions should be removed from the Copyright Act. Compliance with an industry approved code ought to be an absolute defence to patent and copyright claims (if the infringing activity is discontinued within a reasonable time after judgment is given proving the claim);

(c) reassert the prominence of competition law, removing exceptions for copyright and patent licensors (in section 51(3) of the TPA). Legislation should clearly state that ownership of property, interoperability and competition rights take precedence over copyright, patent and trade mark legislation;

(d) ensure that any after market control of items (including non-physical items) or their use should be limited to contractual rights and technical methods. Legality for circumventing technical methods should be restored and returned to its historical importance;

(e) eliminate restricted use materials in the education sector. These are inconsistent with children's everyday broader experience of modifiable redistributable content and the restricted use paradigm will cause students to not reach their potential. Governments should institute a program to use purchasing power to progressively develop educational materials and license them openly;

(f) contribute to FLOSS development by adapting the existing payment system for copyright works to fund the development of the FLOSS industry. Such a system would involve voluntary payments based on usage of FLOSS to a collecting society specifically created for FLOSS, such money to be spent on FLOSS related industry development;

(g) commercialise publicly funded innovation under a FLOSS licence (although it may also be commercialised under other non-FLOSS licences). Publicly funded development should not be exclusively licensed;

(h) use open data formats (eg odf) for Government data that is intended to be retained for extended periods or used for interchange with the public. Recent developments at ISO indicate that ISO approval is not sufficient for a format to qualify as “open”;

(i) eliminate existing discrimination against FLOSS in its metrics, tender procedures and approaches to purchasing;

(j) have no closed source dependencies for the access to services or data – in particular no such dependencies should be present for regulatory, corporate or tax authorities or departments (eg ACCC, ASIC and ATO);

(k) interact with business and consumers on a technology neutral basis either through the use of established open standards, or on a very technologically conservative basis with an emphasis on documented, widely accessible and interoperable formats;

(l) maintain a publicly available portal detailing its use and contribution to FLOSS;

(m) discard existing metrics for innovation and implement metrics which measure institutional progress or the value to society as a whole of innovation (taking into account additional costs or cost savings rather than simply on revenue or GDP). For more details see: http://brendanscott.wordpress.com/2008/04/23/tradegy-of-the-anti-commons/;

(n) not discriminate against open source in Government tenders, Government purchasing or Government grants. Discrimination against open source includes specification of products rather than requirements, and specification of requirements which are an implicit specification of a product. Grant conditions should not discriminate against FLOSS commercialisation of outputs. Grants should be made preferentially for those projects which promote interoperability between Government and FLOSS operating systems;

(o) allocate grants to assist in funding creation of software packages for SMEs students and government. Grants should also be targeted as incubators for entrepreneurs using or developing FLOSS;

(p) use IP clauses in grant documents that anticipate:

(i) third party FLOSS may form part of the outputs; and

(ii) research outputs must be able to be commercialised through FLOSS licensing;

(q) prefer technologies for which there are multiple providers/supporters which are not contracted to a single ultimate source for the supply of the technology over those which are;

(r) ensure that the acquisition by Government of software permits Government to freely redistribute that software to all citizens. Failing that, the Government should mandate in procurement of software that the Government can on-sell or on-supply copies of software it has acquired (including, but not limited to at the end of life of the software), and must be able to do so independent of any hardware acquired in conjunction with such the software. For example, if the Government acquires 10 copies of software, it must at a minimum be able to on-supply each of those 10 copies (possibly on the basis that it deletes that number of copies from its own system). Similarly, whole of Government contracts must permit each copy acquired under the contract to be on-supplied.

3.2 All of these things can be achieved over the medium to long term by a change in government action or by encouraging industry to voluntarily adopt licensing overlays on existing legislative entitlements. In each case this is without coercion of any industry participant.

4. Discussion – Metrics

4.1 Metrics must be reengineered to account for the value of FLOSS. A whole range of existing metrics used for policy formulation are clearly wrong in the FLOSS context. For example, metrics which focus on revenue implicitly assume value is generated through sale of a product. However, FLOSS products generate value by providing an opportunity to use or by providing a cost saving. For any organisation which uses FLOSS there may be no direct impact on revenue, but rather an impact on profit, or, alternatively the revenue of the organisation will be better utilised (eg savings from FLOSS may be spent on development).

4.2 Measuring the benefits and costs of technology should be focussed on whole of community cost or benefit and not on the benefit to government or benefit to department. Subsidised use by specific departments impose costs on the wider community. These costs must be taken into account when evaluating tenders. This is particularly important for key public resources such as libraries, galleries, public transport information etc.

5. Discussion – Unhelpful Subsidies to Distributors

5.1 The main block on institutional progress is not the lack of innovations but legal rules prohibiting the implementation and incremental improvement of existing innovations.

5.2 Institutional progress is currently strangled by an unwarranted attachment to a model of progress which is 50, if not 200 years out of date. Indeed, policy in this area has become more backward looking over the last 20 years, with the rapid expansion of legislative monopolies. The current policy framework gives undue preference to "innovation". It does this by giving monopolies (primarily through patent and copyright law) on the distribution of the outputs of innovation. In essence, the current framework subsidises distributors on the assumption that distributors will use those subsidies to promote innovation.

5.3 These subsidies come at a high cost – the opportunity cost of lost distribution and therefore of dead weight loss of (use of) innovations. The implicit policy choice at the edge case is that it is better (for example) to prohibit the distribution and use of a word processor in order to make a one off contribution of $1,000 to the economy (ie the licence fee for the producer of that software) than it is to permit the relevant person to use the word processor for free and contribute the $20,000 *per year* (probably increasing over time) of extra value to the economy that they are able to extract from their skills and training when they have access to and use of this tool. This policy choice is wrong.

5.4 The canard that software, as a public good, presents a particular problem of financing must be expressly rejected. The argument goes – how will these innovations be funded if anyone is able to free ride on them? If they can't be funded these innovations will be lost to society. This argument may have been credible 30 years ago, it is patently false now. For the specific example of word processing there are multiple word processors which are available free of charge. For the more general case all of the (exponentially growing) content on the internet is the counter example.

5.5 Moreover, by subsidising distributors Australia backs the wrong horse – as there are no major Australian owned distributors of technology. The innovation system implicitly requires Australian innovators to sell their innovations to foreign owned distributors, thus

permitting the majority of profits from innovations to be reaped offshore.

6. Discussion – Copyrights, Software Patents

6.1 The structure of the Copyright and Patent Acts (and similar legislation) and the decision of parliament to exclude much of the exercise of entitlements under these Acts from the purview of the Trade Practices Act has rendered competition policy irrelevant to the future of at least the technology sector of the economy – and through it, any sector of the economy which can be structured so as to be reliant on technology. In our view, over the medium term this will encompass the majority of the economy.

6.2 As recently as two decades ago it would have been anathema to allow vendors to have legal control of aftermarkets for their products. Legislative changes in that time have reversed that, with the legislature practically endorsing such practices (eg: technological protection measure legislation).

6.3 The Copyright Act is a vast array of ad hoceries. This ad hoc structure is a substantial problem for SMEs. It requires them to acquire specialised legal advice and its complexity means that legal advice is difficult to be definititve. This is a major risk for SMEs. The Act is in desperate need of simplification. In particular entitlements relating to rights of access control protection measures and authorisation should be either removed or substantially limited.

6.4 The introduction of new restrictions in (eg) the Copyright Act are inimical to institutional progress as they break existing licences and agreements. Example: the courts had held that the reproduction of a computer program in RAM was not an infringing reproduction under the Copyright Act. The legislature subsequently introduced changes to the Act which made such reproductions illegal. This has had the likely effect of converting the use of free and open source software for Software as a Service (SaaS) implementations from a legal activity to an illegal one.[1] This is because FLOSS licences are anything up to 20 years old and were not drafted with these expanded restrictions in mind.

6.5 The patent system for software is broken. Not only is it prohibitively expensive for an SME to conduct any sort of patent search, such searches are by their nature inconclusive. Patents which are found may be invalid because of prior art, or the search may fail to identify patents which read against the SME's product or service. If patent searching is prohibitively expensive, patent litigation is at least three orders of magnitude moreso. Patenting of inventions is an additional burden (roughly AU$20,000 per patent per jurisdiction of coverage) which must be borne by SMEs – particularly those wishing to raise investor capital. In most cases this is a wasteful allocation of resources.

6.6 The patent system creates a general preference in favour of larger (and therefore likely foreign) companies who are able to either defend a patent claim, or are able to licence the relevant rights. Any commercial activity by any SME is currently likely at the pleasure of at least one undisclosed patent holder.

7. High Level Issues – Nature of Institutional Progress

7.1 Institutional progress needs to recognise that:

1 See discussion at: http://brendanscott.wordpress.com/2008/03/19/foss-software-and-saas/

(a) new innovation models presuppose substantive contribution by the community as a whole. Equity and efficiency demand that rights vest in the community as a whole, and not in particular subgroups (for example, in the case of copyright at the moment this is vested in those persons who reduce the work to a material form despite the substantial contribution of others such as those providing quality assurance, distribution or bug testing). The whole of the community should have an interest in the exploitation of community generated works. Property created by members of the community should not be able to be stolen from under them either directly or implicitly through the application of inappropriate legislative rules;

(b) innovation is incremental and the creator of an initial innovation should have no ability to prevent third party improvements, extensions or complementary products and should have no control over such improvements, extensions or complementary products.

7.2 A necessary consequence of minimisation of transaction costs is the lack of purpose based restrictions on licensing. Restrictions such as “non commercial” and/or “free for education” impose a cost on any potential user of the content both at the time of acquisition and at all times in the future (in that they will have invested in the item and that investment will be lost if they subsequently wish to change their purpose to a prohibited one). In effect, purpose based licences require licensees to foresee all (or all likely) future uses of the material. It is not appropriate for Government to impose such a burden on licensees.

Please call me if you would like clarification on any issues identified above.

Yours faithfully,

[by email 30 April 2008]

Brendan Scott,
Director
Open Source Industry Australia Limited