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Ms Jackie Morris
A/g Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: LegCon.Sen@aph.gov.au

Dear Ms Morris,

Provisions of the Copyright Amendment Bill 2006
Supplementary Submission, including Response to Question on Notice

1. Summary

1.1 In the absence of a clear exception for interoperability to permit access to a customer's data the provisions in Schedule 12 pose a substantial threat to our member's ability to compete in the software market.

1.2 The Bill itself has biases against SMEs.

1.3 The rapid evolution in the market precludes "fixing things later" as an option.

1.4 The linkage between copyright infringement and access is not only consistent with, it is required by the context of, the AUSFTA. A disjunction between infringement and the provision of access should be presumed against, and only negatived by express words to the contrary (which are absent in the AUSFTA). The Committee should endorse Recommendation 2 of the House of Representatives Committee Report on TPM Exceptions.

1.5 Reports published by the Business Software Alliance of Australia indicate that extending copyright legislation does not reduce the rate of piracy in software.

1.6 Links to organized crime should not be used to justify the passage of Schedule 12.

2. About this Submission

2.1 I am a director of Open Source Industry Australia Limited (OSIA). I make this submission on behalf of that company.

2.2 We have not had access to a transcript of proceedings when drafting this supplementary submission.

3. About OSIA

3.1 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. All of OSIA's members are copyright owners. The exploitation of copyright is a critical component of the business of all OSIA members.

3.2 OSIA membership comprises mostly SMEs from around Australia, but it also counts large organisations and several multinationals among its membership.

4. Question on Notice

4.1 We were asked to respond to the following question on notice:

> *"No, I know. I just have something that they could perhaps write a few notes on, and that is the impact on the capacity of software developers, particularly in the open source area, to be innovative and write new software in this complementary and competitive way that has been described—so we can get that insight."*

4.2 OSIA believes that, in the absence of an exception permitting the interoperability between programs and our customers' (and potential customers') data, that the provisions of Schedule 12 will have a substantive adverse effect on competition and innovation.

Lack of interoperability

4.3 While this effect will not be immediate, the wording of the Bill practically invites any person who has the will and the resources to wrap their software, but more especially their customers' data, within a technological protection measure. If they are able to do this, then it will be illegal for competitors to provide services in respect of that data (to the extent they require access) and to provide competitive programs (to the extent those programs require access to the customers' existing data).

4.4 This is not idle speculation. In the few short years following the passage of the US DMCA provisions, there have been many cases litigated in which vendors in disparate industries have clearly structured their arguments to fit within the DMCA provisions. Moreover, a number of those cases have already not only reached the appellate level in the United States, but judgment in those cases has been given. Further, in the five years following the passage of the initial

tranche of TPM legislation in Australia, we have had a High Court decision on a key definition of the TPM scheme. OSIA believes this amply demonstrates that certain players in the industry clearly have the determination to use these rights to the fullest extent and to manipulate any opportunity provided by the legislation.

No Second Bite of the Cherry

4.5 We note that in the fast moving world of online commerce (YouTube, for example, rose to prominence from nothing in roughly 18 months), there will be little opportunity for the legislature to correct an overly zealous TPM regime. The legislature must be proactive in preserving a competitive industry, rather than reactive.

Provisions Prefer Incumbents

4.6 These provisions, by their nature, prefer incumbents. Software markets are intrinsically affected by network effects. That is, the more people who use the product, the more valuable the product becomes to others. New entrants must offer interoperability in order to offer a viable alternative (and will therefore be less likely to pursue TPMs). However, incumbents have nothing to gain by offering interoperability. TPMs, if used with only a modicum of thought, offer an ideal bar to competition.

4.7 TPMs, by their nature, are expensive to create and maintain. If they are not to be worked around immediately (and, as far as we are aware, they have all been worked around in a comparatively short space of time – say months rather than years) much thought needs to go into their design. Moreover, a complex system of controlling the distribution of the system to implement the TPMs, and to manage the distribution of "player" modules must be maintained. This is also an expensive process. The Schedule 12 provisions will primarily be of benefit to large organisations. Further, because of the network effects involved, there is the real danger that a single TPM system will "win out", allowing the controller of that system to become a gatekeeper for software or content. This would reduce returns to creators (as they would need to pay for access to the system) while increasing prices for consumers.

Balance of Bill

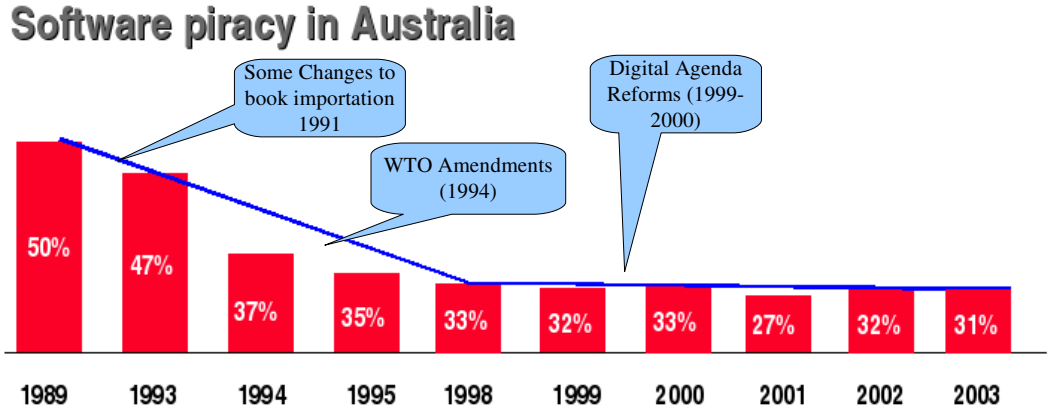
4.8 The provisions in the Bill (not just those in Schedule 12) are quite complex and involved (the *Copyright Act* currently runs to over 400 pages). The compliance burden, both for customers and for businesses is a very heavy one, and one which is not easily met by small enterprises. The Bill (and the Act) as a whole creates a climate of fear. Some interests in the software industry deliberately play on this fear. They argue, for example, that if software is priced cheaply it must be because of piracy, and that if someone gets their licensing wrong they may go to gaol. New entrants are placed in the invidious position of charging a high and uncompetitive price for their product or

attempting to compete on price at the risk of being *de facto* branded as pirates – with the implied threat that if someone buys from you they will end up in gaol. This will be greatly exacerbated by the inclusion of strict criminal liability provisions for infringement.

4.9 In this climate, where minor breaches can result in disproportionate civil or criminal penalties, if a customer is put to the choice between two potential suppliers, they are more likely to prefer a name brand supplier as it will be perceived to be a less risky option, all other things being equal. While this will be true of any business, it will be especially true for small business customers and consumers. The Bill therefore is biased against small and medium enterprises – the very enterprises which form the core of OSIA's membership.

5. Software Piracy Unaffected by Changes to Copyright Act

5.1 Research conducted on behalf of the Business Software Alliance clearly shows that piracy rates in respect of software in Australia are not reduced by extensions to the *Copyright Act*. During the period of the research from 1989 to 1999, the greatest changes to the piracy rates occurred in a period of legislative inactivity. Conversely, the monumental changes made to the Act in 1999 and 2000 have had no discernable impact on piracy rates in Australia (the rates for 2004 and 2005 are 32% and 31% respectively).[1]



***Source**: International Planning & Research (IPR) annual benchmark surveys for BSA 1989-2002. International Data Corporation (IDC) global piracy study conducted on behalf of the Business Software Alliance, 2003. Released July 2004. (Based on 5,600 interviews in 56 countries and comparison of PC and software shipments in 86 countries)*

(Graph taken from BSAA slide pack. Callouts indicating passage of copyright related

1 Diagram from Business Software Alliance of Australia, Slide Deck titled "*Managing One of Your Most Valuable Assets – Software*", slide 10 available from http://www.bsaa.com.au/bsaaweb/main/downloads/BSAAPresSAM.ppt (downloaded 7 November 2006).
Piracy statistics from 2004 and 2005 from *Third Annual BSA and IDC Global Software Piracy Study*, May 2006, Table 1 at page 4 available from: http://www.bsaa.com.au/bsaaweb/cmsimages/Admin/pdf/2005PiracyStudyOfficialVersion.pdf.

legislation added.)

5.2 The evidence speaks for itself.

6. Copyright Infringement Requirement and Consistency with AUSFTA

6.1 There was an issue raised as to whether the inclusion of a requirement for a connection to the infringement of copyright was consistent with the requirements of the AUSFTA.

6.2 We believe that such a requirement is consistent with the requirements of the AUSFTA, and, moreover, is mandated by the interpretation given to practically the same words by appellate level decisions in the US.

Exposition

6.3 The relevant wording of AUSFTA (17.4.7(a)(i)) creates liability for a person who "*circumvents without authority any effective technological measure that controls access to a protected work...*"[2]

6.4 In *Chamberlain v Skylink*,[3] the US Court of Appeals for the Federal Circuit (CAFC) was asked to interpret section 1201 of the US DMCA legislation. That wording prohibits certain dealings in relation to a technological measure "*that effectively controls access to a work protected under this title*".[4]

6.5 The plaintiffs in that case argued, much as was covered in the Committee's hearing on 7 November, that all that was necessary in interpreting the words was to look at them on their normal English meaning, that the provision of that section of the statute rested on its "plain language".[5] The judgment in the Skylink case was that, when read in the context of its consequences, "*such a redefinition borders on the irrational*".[6] The judgment also stated that "*the broad policy implications of considering 'access' in a vacuum devoid of 'protection' are both absurd and disastrous*".[7]

6.6 In *Storage Technology Corporation v Custom Hardware Engineering & Consulting Inc and David York*,[8] a later case considered by the CAFC (but

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2 In addition, the definition of effective technological measure is "*Effective technological measure means any technology, device or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other subject matter, or protects any copyright.*"

3 *The Chamberlain Group, Inc. v Skylink Technologies, Inc*, US Court of Appeals for the Federal Circuit 04-1118, August 31, 2004. The text of the judgment is available here: http://www.eff.org/legal/cases/Chamberlain_v_Skylink/20040831_Skylink_Federal_Circuit_Opinion.pdf

4 The relevant "title" (ie legislation) is the US Copyright Act (17 USC). The text of the relevant provision (1201) quoted in the case is included in the Schedule.

5 Chamberlain v Skylink at 9.

6 *'Chamberlain's proposed construction of § 1201(a) implies that in enacting the DMCA, Congress attempted to "give the public appropriate access" to copyrighted works by allowing copyright owners to deny all access to the public. Even under the substantial deference due Congress, such a redefinition borders on the irrational.'* Chamberlain v Skylink at 36.

7 Chamberlain v Skylink at 37.

8 *Storage Technology Corporation v Custom Hardware Engineering & Consulting Inc and David York,* US Court of Appeals for the Federal Circuit 04-1462, August 24, 2005. The text of the judgment is available here: http://fedcir.gov/opinions/04-1462.pdf

with the court composed of different judges), the judgment affirmed the decision and reasoning in the Skylink case.[9]

6.7 There are no relevant differences between the AUSFTA wording and that considered by the cases mentioned above. Nor are there any relevant differences between Australia and the US in the policy considerations that the court took into account (such as, for example, the balancing of interests of users and creators). These cases reflect current state of US law on the issue. OSIA is not aware of any cases being brought or in train which might challenge these findings.

6.8 OSIA believes that the reasoning of the Skylink and Storagetek cases is directly applicable to the interpretation of 17.4.7 of the AUSFTA. We believe that to ignore the context of section 17.4.7 and simply read the plain words of the legislation would be inappropriate. Rather, a disjunction between infringement and the provision of access should be presumed against, and this presumption only negatived by express words to the contrary in the AUSFTA.

6.9 This issue was considered at length by the House of Representatives in its report. Their second recommendation was:

> *The Committee recommends that, in the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement, the definition of technological protection measure/effective technological measure clearly require a direct link between access control and copyright protection*

6.10 The wording in the Bill is no link at all. It is certainly not a clear link.

7. Organized Crime etc

7.1 We note the comments of the IEAA representatives in the hearing of 7 December, in which a linkage was made between piracy and organized crime. OSIA has no knowledge of such links but will assume they exist for the sake of argument.

7.2 There is no basis for interpreting the existence of such a link as supporting a need for the TPM provisions. Organized crime, by definition, will not be complying with the law. If organized crime is able to profit off illegal software, the inclusion of these provisions simply eliminates legitimate businesses from the pool of potential competitors, thereby raising the potential profits to be made by criminals from a breach of the law. Extending these provisions will raise their profits, not lower them.

7.3 We note that piracy is not an issue for the open source industry (see our earlier submission). No one has shown any link anywhere in the world between illegal sales of open source software and the funding of organized crime in any form.

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9 A dissenting judgment did not address the issue.

8. Conclusion

OSIA acknowledges that the provisions of Schedule 12 are contentious, and that a lot of effort has already been put into the provisions to ensure that they strike an appropriate balance. We believe it is important for the preservation of effective competition for there to be a clear exception for interoperability. Thank you for the opportunity to make a supplementary submission to the Committee.

Yours faithfully,

[by email 8 November 2006]

Brendan Scott
Director
Open Source Industry Australia Limited

Schedule

17 USC 1201

§ 1201. Circumvention of copyright protection systems

(a) Violations regarding circumvention of technological measures.

(1) (A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. . . .

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that-

> (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
>
> (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
>
> (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

(3) As used in this subsection-

> (A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and
>
> (B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.