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The Secretary
House Standing Committee on Legal and Constitutional Affairs
By email: laca.reps@aph.gov.au

Dear Secretary

Submission to

Inquiry into Technological Protection Measures (TPM) Exceptions

1. About this Submission and Open Source

1.1 I am a director of Open Source Industry Australia Limited (OSIA). I make this submission on behalf of that company. OSIA is a company limited by guarantee established to represent the interests of the open source industry in Australia.

1.2 Open source is a new development and licensing model for intellectual property. Open source is widely regarded to be the future mode of development of most software[1] and its best known operating system Linux, as the only viable contender to Microsoft's dominance of the personal computing market[2]. Open source is supported in Australia by a number of substantial players in the IT sector, including IBM, Sun, HP and CSC. Many of the leading figures in the open source movement, and key open source projects are Australian in origin. Open source has been acknowledged in a wide variety of Government initiatives both in Australia and around the world[3]. At the

1 On one estimate Sourceforge (one of the major open source repositories) currently produces 30% more software than Microsoft, with this figure rising to nearly four times the productivity by the end of the decade. http://www.internetnews.com/dev-news/article.php/3508051.

2 See, for example, a comment by Gartner at a recent conference: "Linux and Windows will be the only two operating systems left in five years," http://www.linuxinsider.com/story/hX7LWtvBxqdD6A/Analyst-Linux-is-the-Future.xhtml

3 See generally: Scott, B., Use of Open Source in Government - Summary of Findings, http://opensourcelaw.biz/publications/papers/bscott%20OSS%20in%20Government%20review%20April%2005%20summary%20050620-lowres.pdf. The Commonwealth Government released the world first Guide to Open Source Software in

Federal election in 2004 all major parties expressed support for open source and the implementation of open standards[4].

2. Summary

2.1 OSIA is very concerned that, without the inclusion of specific wording clarifying their effect, the provisions relating to protection measures will be used to unreasonably control aftermarkets for goods and services, particularly in relation to software products.

3. Proposal

3.1 OSIA proposes that the Explanatory Memorandum accompanying the Bill implementing these provisions include a statement to the effect that it is not the intention of parliament to:

(a) create a separate property right in respect of the provisions relating to technological protection measures;

(b) prevent the normal and customary operation of secondary or after-markets (whether or not such markets currently exist or emerge in the future) in respect of material the subject of a technological protection measure;

3.2 The body of the legislation should also include clear wording to the effect that:

(a) access by the owner, or a person in rightful possession, of a computer, or by a person authorised by such a person, to data stored on that computer will not be in breach of the Act;

(b) the manufacture, sale or advertisement of software or devices which have a substantial purpose of facilitating such access will not be in breach of the Act;

(c) where the principal effect of an access, or the manufacture, sale or advertisement of software or a device is not the infringement of copyright then there is no breach of the TPM provisions;

(d) Part IV of the *Trade Practices Act* takes precedence over the *Copyright Act* to the extent of inconsistency;

(e) The changes as a result of the AUSFTA should not change the meaning of "technological protection measure" or "circumvention device" as those terms have been interpreted in the High Court's *Stevens v Sony* decision.

4. Note on Scope of Exceptions

4.1 It is difficult to address the issues raised by the terms of reference without knowing the context in which the exceptions are to be drafted. The scope and

April of this year. The NSW Government let the first tender in the world for a Linux panel contract earlier this year.

4 Open Source Industry Australia, OSIA Welcomes Strong Support for Open Source from Four Main Partieshttp://www.osia.net.au/media_releases/osia_canberra_strongly_supports_open_source

wording of any exceptions will be significantly affected by the specific wording adopted in the main TPM provisions, as well as how the exceptions other than those in paragraph (e)(viii) are worded.

4.2 In particular, if the interoperability exceptions do not permit interoperability between a program and data (as opposed to between two computer programs) then an additional exception for data interoperability would be needed. Interoperability between a software and data is perhaps the more important form of interoperability.

5. Discussion

5.1 The main concern of OSIA is that the TPM provisions can be effectively used to foreclose aftermarkets for goods and services. If the provisions permit this, then they will greatly reduce contestability of those markets and therefore strongly preference incumbents. As an emerging industry, the open source sector would be placed at a special disadvantage as a result.

5.2 Specific examples of how TPMs can be used to control aftermarkets are set out in the Schedule. In short:

(a) if a TPM can be implemented then third party suppliers can be excluded from the provision of goods and services in respect of that component;

(b) wherever a query/response can be implemented, so can a TPM; and

(c) a query/response appears to be able to be implemented in a wide variety of circumstances.

6. How is the US Law Developing?

6.1 One of the important considerations in the drafting of laws flowing from the AUSFTA is the desirability of consistency between Australian and US law. The US TPM law is known as the Digital Millennium Copyright Act, or DMCA (with which the requirements of the AUSFTA have much in common). It is appropriate to inquire into how US courts have interpreted the DMCA as the drafting of Australian laws which are inconsistent with US interpretations will result in substantial costs to businesses which operate in both jurisdictions.

6.2 Subsequent to entry into the AUSFTA, a number of cases have been heard at an appellate level where litigation has been brought under the TPM provisions for the express purpose of shutting down aftermarkets. These include:

(a) Lexmark[5] - litigation attempting to prevent sale of aftermarket printer cartridges (October 2004);

(b) Skylink[6] - litigation attempting to prevent sale of aftermarket garage

5 *Lexmark International Inc v Static Control Components* (Court of Appeals for the Sixth Circuit) http://www.eff.org/legal/cases/Lexmark_v_Static_Control/20041026_Ruling.pdf

6 *The Chamberlain Group Inc v Skylink Technologies Inc* (Court of Appeals for the Federal Circuit)

door opener device (August 2004);

(c) Storagetek[7] - litigation attempting to prevent provision of aftermarket maintenance and support of tape cartridge library (August 2005);

(d) bnetd[8] - litigation attempting to prevent provision of aftermarket servers for specific games (purchasers of game clients were forced to use specific servers. This resulted in congestion and poor service provision prompting market demand for third party servers) (September 2005).

6.3 The most significant case for our purposes is the Skylink case. In that case the court considered arguments to the effect that the TPM provisions under US law are separate and independent from the general rights of copyright under their Copyright Act.

6.4 The court looked at the plain wording of the DMCA which, like the TPM provisions in the AUSFTA, seemed to require that where a work is protected by a TPM the owner would possess unlimited rights to hold circumventors liable merely for accessing the work even if that access enabled only non infringing uses. The court observed that while it would defer substantially to Congress in interpreting any law, such an interpretation of the TPM provisions "borders on the irrational" and could not have been the intention of Congress.

6.5 The Court went on to say that "the broad policy implications of considering 'access' in a vacuum devoid of 'protection' are both absurd and disastrous" (see discussion at 34-37). See also the recent result in the Stevens v Sony case[9] in which the High Court made not entirely dissimilar comments.

6.6 The Court observes the potentially disastrous effect on the aftermarket where it says taking the TPM provisions at face value "*would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyright material in a trivial 'encryption' scheme, and thereby gain the right to restrict consumers' rights to use its products in conjunction with competing products. In other words [this] construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies - a practice that antitrust laws... normally prohibit.*"

6.7 The Court also observed (at 22) that "*The essence of the DMCA's anticircumvention provisions is that [they] establish causes of action for liability. They do not establish a new property right.*"

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http://www.eff.org/legal/cases/Chamberlain_v_Skylink/20040831_Skylink_Federal_Circuit_Opinion.pdf

7 *Storage Technology Corporation v Custom Hardware Engineering & Consulting Inc*. (Court of Appeals for the Federal Circuit) http://fedcir.gov/opinions/04-1462.pdf

8 *Blizzard Entertainment v Tim Jung and Other*s (Court of Appeals for the Eighth Circuit) http://www.eff.org/IP/Emulation/Blizzard_v_bnetd/20050901_decision.pdf

9 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 http://www.austlii.edu.au/au/cases/cth/high_ct/2005/58.html

6.8 The Skylink case has been cited with approval in Storagetek[10] (quoting with approval comments of this tenor).

6.9 OSIA urges the Committee to take heed of the Skylink judgment when shaping the TPM provisions.

7. Foreclosure of Aftermarkets is a Real Risk

7.1 With the exception of the bnetd case, the Court in the cases listed above, has consistently reached the practical outcome that the use of the TPM provisions is illegitimate if it prevents the formation or continuation of an aftermarket. In the bnetd case the Court *was* prepared to permit a games vendor to foreclose an aftermarket for the provision of servers in respect of specific games. OSIA believes that the reasoning in the bnetd case is unsatisfactory in that it does not explain, in any detail, how actions of the defendants map against the prohibitions in the DMCA. In any event, the bnetd case is an excellent example that the foreclosure of aftermarkets is a real, not a theoretical, possibility as a result of the TPM provisions.

8. Release of Sony v Stevens decision

8.1 OSIA is aware that the High Court has recently handed down its decision in the Stevens v Sony litigation. Based on its initial assessment of the judgment, OSIA considers that the High Court's interpretation of the TPM definition results is supportive of pro-innovative and pro-interoperable outcomes. In our view it would be preferable if the laws were not changed as a result of the AUSFTA in such a way as to undermine the judgment handed down by the High Court.

8.2 However, OSIA has not had the opportunity to properly understand the reasons given for judgment. OSIA requests permission to submit a supplementary submission if there is anything relevant to add or modify in light of that decision.

Yours faithfully,
[by email 7 October 2005]

Brendan Scott
Director
Open Source Industry Australia Limited

About Open Source Industry Australia Limited (OSIA Limited)

OSIA Limited is not for profit company limited by guarantee established to promote the adoption of open source within business and government within Australia and to represent the interests of the open source industry within Australia.

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10 *"Accordingly we held that section 1201 'prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners.' ... A copyright owner alleging a violation of section 1201(a) consequently must prove that the circumvention of the technological measure either 'infringes or facilitates infringing a right protected by the Copyright Act.'"* Storagetek at 19.

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Inquiry into technological protection measures (TPM) exceptions

Schedule to OSIA Submission

Examples of how TPM provisions can be used to control aftermarkets

Software without data is useless. Software is usually owned by vendors. Data is usually owned by customers. The TPM provisions permit vendors to leverage ownership of software into effective ownership of customer's data. A vendor can design their software so that when a customer saves their (ie the customer's) data, the data is saved in an encrypted format, behind a TPM. No customer will adopt a new product if it means they lose all their existing documents. In order for a third party vendor (of software or services) to compete for that customer's business they must be able to provide a product which interoperates with existing (or legacy) data. It is extremely important for the production of competing products that vendors be able to implement mechanisms which allow a customer to access their own data when stored in a specific format and to do so with automated tools (in order to migrate from old to new formats).

A vendor can also embed data in peripherals and add on devices in such a way as to cause a query/response between the peripheral and main unit. That query/response can be designed to be protected by a TPM. This can be used by the main unit to reject aftermarket/generic/third party peripherals.

Specifically in a client/server application the software can be designed with a query/response system which will prevent the creation of third party clients or third party servers in an exactly analogous way as third party peripherals can be excluded above (these situations are identical for all intents and purposes, except that the query/response is arguably easier to implement in the software only situation). Courts in the United States have already expressed the view that this may be a consequence of the TPM provisions. It is important therefore to remember that **any software** can be designed as client/server and many significant applications are actually implemented in this way. See comments on the bnetd case in the body of the submission.

A vendor can encode information which is transmitted between various components of its products. This encoding can be used to prevent the provision of third party maintenance in respect of those components, or in respect of the products as a whole.