AUSFTA

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To: Committee, Treaties (REPS)
Subject: Inquiry into Australia - US Free Trade Agreement

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BY:

Dear Secretary

This is a submission in respect of the Australia-United States of America Free Trade Agreement, agreed at Washington on 8 February 2004, due to be signed after 13 May 2004 (FTA) and the current reference of the Joint Standing Committee on Treaties in respect of that Agreement. My address details are below.

Background

My comments relate solely to the provisions of Chapter 17 of the FTA. These comments are the result of concerns expressed to me by members of the open source community and to some extent, the result of my own analysis of the Chapter.

Open source is a new model for software development which makes creative use of the copyright monopoly to drive innovation while lowering development costs and therefore costs to consumers. It has resulted in substantial cost savings to a number of countries. In Thailand, it has brought a previously unheard of price discipline to that market, with operating and application systems bundles dropping on the order of 85%
Refs: http://www.infoworld.com/article/03/05/23/HNthailinux_1.html
http://news.com.com/2100-1012_3-1019067.html

Open source effects its success through creating an effectively free market for software. The underlying economics is that substantial components of the end price to consumers are transaction and compliance costs. By using innovative licensing techniques open source software not only permits drastic reductions in pricing to end users, it also permits expenditure on software to be capital expenditure, so all payments produce lasting value. At present, the vast majority of software expenditure is in the nature of rents - with customers never owning what they pay for. In the long run, open source promises to reverse the current deficit run by Australia in relation software purchasing and even to convert that money spent on importing software products into money received for exporting software services. IBM has recently established a world class open source facility in Canberra.

Concerns

The following provisions of the FTA threaten to seriously damage the open source market in Australia:
(a) anti-circumvention provisions
These are prohibitions on accessing data which has been protected by a technological measure. The explicit purpose of these provisions is to prohibit data interoperability. If open source vendors are not permitted to implement data interoperability, they will face substantial barriers to entry in many important submarkets. In essence, a vendor will be locked out of competition merely because the current incumbent uses a protected format for customers to store their data in. These provisions unreasonably exacerbate network effects in relation to computer software. The FTA includes exceptions for the "interoperability between computer programs" however these exceptions do not address the issue of reproducing data formats and are not responsive to the issue.

These prohibitions were initially created to protect a small minority of content producers from competition from new technologies, particularly in respect of audio and video content. However these provisions have already been subject of much broader implementation in the United States. In particular they have been used to inappropriately suppress competition in respect of printer cartridges and garage doors. They can be used to anti-competitive effect on any article to which a computer chip can be attached - and there is

every reason to suspect that if this category does not already encompass all manufactures, it will do so in the not too distant future.

While they have been characterised as applying to prevent unauthorised copying of music, it would be a grave mistake to think they will be restricted to this area in the future. The anti-circumvention provisions are a legislative imprimatur to the reduction of competition across the whole breadth of the economy. No analysis of the economic impacts of the FTA that I am aware of takes into account this extensive anti-competitive effect. At its worst it will shave percentage points off Australia's GDP.

(b) patent provisions
The patent provisions inappropriately expand the rights granted to patentees and inappropriately restrict the circumstances in which licences may be compulsorily acquired. In particular, open source software effects the disclosure of inventions without the requirement for the grant of state sanctioned monopolies. In other words, open source gives the benefits of a patent system for software without the high social costs (as a result of the absolute monopolies effected by patent law) that come with it. However patenting of software inventions permits the absolute foreclosure of open source implementations. In the United States software patents are issuing at an alarming rate - tens of thousands per year. With the life of a patent being two decades, any SME who wishes to compete in the software area has an impossible compliance task ahead of them. These compliance costs are bad enough for SMEs operating under the old model. The legislative approach is in direct contradict
ion to the approach of lowered transaction costs which underpins the new open source model.

The worst thing about them is that independent invention is no defence to a patent. Therefore these compliance costs must be incurred even where the work is entirely non-infringing.

(c) Enforcement provisions.
The enforcement provisions fail most tests of reasonableness in that, in civil cases, they consistently require the payment of damages in excess of the damage actually suffered by a plaintiff. This means that monopoly infringements must be elevated above other commercial risks to be considered by a business decision maker.

The enforcement provisions also include definitions of "wilful infringements on a commercial scale" which clearly encompass non-commercial infringements. In particular, infringements for which there is no "direct or indirect financial benefit" to the infringer are considered to be on a "commercial scale", exposing the citizen to subsantially increased liability.

Conclusion

It is very concerning that the FTA seeks to entrench ways of doing things which are fast becoming outdated. They increase compliance costs and push those costs onto smaller and smaller enterprises. Historically market activity was primarily conducted by large organisations, which permitted the aggregation of search and compliance costs. More recently there has been a higher level of disaggregation and community participation than has been evident in the past. We are in a state of transition at the moment and now is exactly the wrong time to be entrenching particular ways of doing things, especially where they are likely to be inappropriate to new modes of production. Chapter 17 does not include provisions to change the terms to reflect (eg) agreements at the WTO, should an international body arrive at a different way of doling out monopolies which leads to better market outcomes but which are inconsistent with the provisions of Chapter 17.

Open source methodologies have scored substantial victories over the past 18 months and are increasingly being adopted by countries from Europe, to SE Asia to South America who are seeking to jump start their software industries. While I do not believe that the Chapter 17 provisions will have an immediate impact on open source, I do strongly believe that the medium to long term outlook is extremely concerning. In the worst case scenarios these provisions have the potential to literally shut down open source development in

Australia, especially among SMEs. It is extremely important for Australia to preserve its policy making flexibility in these areas.

Yours faithfully

Brendan Scott

Brendan is a lawyer practising in the areas of open source and ICT law. He runs a practice in Sydney called Open Source Law and has over 10 years of experience. He has extensive experience working for the private and public sectors and for vendors and customers of ICT and has worked on substantial transactions in this area.

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