Reconciling AUSFTA 17.4.7

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1 About Linux Australia

Linux Australia is Australia's peak body representing the interests and concerns of Australian Linux and Open Source Software (OSS) developers, system administrators and users. Linux Australia is also the organisation behind linux.conf.au, one of the world's top Linux development conferences.

Linux™ is a computer Operating System, a complete replacement for "closed-source" systems such as Microsoft Windows™. While a major player in large (server) computers, and tiny (embedded) devices, Linux accounts for less than 5% of the desktop market[1].

Open Source Software (including Linux) is developed openly, with users invited to contribute, enhance and distribute the software. Providing full access to the "source code" used to develop software is attractive to many businesses and individuals; it is Open Source's key competitive advantage over other software.

[1] Linux To Ring Up $35 Billion By 2008: TechWeb December 16 2004
http://www.techweb.com/wire/showArticle.jhtml?articleID=55800522

2 Concerns with Current §116A

Linux Australia has made several submissions on the potential effects of the Digital Agenda modifications to the Copyright Act on software competition in Australia. Particular concerns have been raised by overseas actions against some forms of Open Source software, one of the few software areas where Australia seems to lead[2].

We are particularly concerned that the law allow activities which are completely legitimate, such as playing legally purchased DVDs on legally purchased laptops running Open Source DVD playing software. This is a common activity of our members, who generally prefer Open Source software.

Under Australian law, this software can be construed to be a "circumvention device." Australian law does not currently ban *use* of such things, but does ban their creation, distribution and import, which casts a shadow over Open Source deployments, consulting and business growth. We have long sought a standard in the Copyright Act that ensures we can create, distribute and maintain competitive software which Australian consumers and businesses need.

We are still pursuing such a standard, and the absence of this standard is already hindering competition in the software market. You can buy many shrink-wrapped boxes of Linux software in Australia, but none include our Open Source DVD playing software which would be our equivalent of the proprietary DVD playing software bundled with (the proprietary) Microsoft Windows, our chief competitor. Distributors, fearing litigation, leave individual users to download this software themselves, generally from Europe.

[2]Boston Consulting Group Open Source Technology Group Hacker Survey, pg 22, indicates disproportionate Australian involvement:
http://www.ostg.com/bcg/BCGHACKERSURVEY-0.73.pdf

3 Open Source is Directly Affected

The problem is a simple one. To be competitive in the desktop market, computer operating systems must include software able to play copyright content such as movies and music. Some of these copyrighted works are protected by some form of technological protection measure (TPM), such as the "Content Scrambling System" used on DVDs, or the "copy protection" on some audio CDs. This trend is set to increase: all mainstream online music is encrypted in some way, and both proposed successors to the DVD format are encrypted and use region encoding.

An overreach in anti-circumvention law would mean that all players of such things must come from the copyright holder (or those authorised by them), under whatever terms they choose to license. It would be illegal to create, import or market your own device which does the same thing.

This does particular harm to Open Source Software, as we can see in the most obvious candidate, our Open Source DVD-playing software. This is because we are one of the few competitive forces in a computer software market dominated by two large players (Microsoft and Apple), and because we seek to create our own (superior!) counterparts to their offerings, whether it be DVD playing software, music playing software, or other tools modern computer users expect. Banning competitive "unauthorised" products bans us from the market.

This harm is accentuated because Open Source companies tend to be small businesses and consultants; Open Source licensing is more competitive than the proprietary licenses of Microsoft et. al, but more competitive licensing means more competition, which means lower profit margins. This is great for consumers, who gain high-quality IT infrastructure at lower cost, but it means that few Open Source companies have the resources for a legal battle. This creates a barrier for Open Source Software in these areas that no business in Australia seems willing to cross.

Open Source DVD playing software is widely used, and at the moment, that use is legal. The FTA requires that use of a circumvention device be prohibited, and this could capture Open Source DVD software—making current, widespread activity suddenly illegal. This is not a desirable outcome, as the government has acknowledged this year. We have just had an inquiry on whether VCRs and MP3 players should be legal to use. It would be extremely odd if at the same time we made other widely used consumer devices illegal!

4 US Law Is Being Interpreted Differently

In drafting our laws under the Free Trade Agreement, Australia can learn from developments in the US. Courts of Appeal in the US have interpreted their anti-circumvention laws (aka. the DMCA) in ways that ensure it is used for its primary mission: preventing widespread copyright piracy. The US Court of Appeal for the Federal Circuit has made two explicit rulings on the scope of these laws, first in *Chamberlain*[3], and again in *StorageTek*[4], which should be considered for inclusion in our Australian law:

Irrevocable authorisation: circumvention is only illegal where undertaken without authority, but the court has clarified that authority can come from the copyright owner *or* copyright law itself.

Related infringement: US Courts have ruled that a copyright owner alleging breach of the anti-circumvention provisions must prove that such circumvention either infringes, or facilitates, infringing a right protected by the Copyright Act.

Neither of these qualifications on the scope of US anti-circumvention law are to be found in the text of their Act. Nonetheless, they represent the unanimous opinion[5] of the US Court of Appeals for the Federal Circuit; while two other appeals courts have heard cases[6] neither have spelled out any framework for application of anti-circumvention law (nor did they contradict the framework created in *Chamberlain*). The Court of Appeals for the Federal Circuit is seen as particularly influential on Intellectual Property matters: it was initially created to hear patent cases.

The qualifications expressed by the court are particularly relevant here, because neither qualification is found in the text of the Australia-US Free Trade Agreement, nor the current Australian Copyright Act. These rulings however, are an appropriate limitation on the scope of these laws, and ensure they are confined to their mission—preventing copyright infringement.

[3] *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, United States Court of Appeals for the Federal Circuit, August 2004. (*Chamberlain*)

[4] *Storage Technology Corporation v. Custom Hardware Engineering & Consulting, Inc,* United States Court of Appeals for the Federal Circuit, August 2005 (*StorageTek*)

[5] *StorageTek* was not unanimous, however Judge Rader's dissent was not on the question of circumvention, but another aspect of the case. The dissent does not mention the DMCA at all.

[6] *Blizzard v. Bneid* in the Eighth Circuit and *Universal v. Reimerdes* in the Second Circuit

4.1 Irrevocable Authorisation

The DMCA (17 U.S.C. §1201(a)(3)(A)) defines circumvention as an activity undertaken "without the authority of the copyright owner." This mirrors the Australian definition of technological protection measure which works by requiring "authority of the owner or exclusive licensee of the copyright".

The Court indicated in *Skylink* that this authorisation is granted for certain things by the Copyright Act itself, and that withholding authorisation to access after sale simply isn't a power that the copyright holder has:

> Underlying Chamberlain's argument on appeal that it has not granted such authorization lies the necessary assumption that Chamberlain is entitled to prohibit legitimate purchasers of its embedded software from "accessing" the software by using it. ... It would therefore allow any copyright owner, through a combination of contractual terms and technological measures, to repeal the fair use doctrine with respect to an individual copyrighted work–or even selected copies of that copyrighted work. ... **Copyright law itself authorizes the public to make certain uses of copyrighted materials.** Consumers who purchase a product containing a copy of embedded software have the inherent legal right to use that copy of the software. **What the law authorizes, Chamberlain cannot revoke.**[7]

Australia has neither explicit wording in §116A, nor case law on this point: do Australians have irrevocable authority to play DVDs they own? We consider this question redundant: if you don't have the right to use something, you don't "own" it. Most Australians would be upset to find that they don't clearly own the DVDs they have purchased. We believe they do, and should.

[7] *Chamberlain* pg. 40

4.2 Related Infringement

The second significant interpretation of the US Court of Appeals for the Federal Circuit is stated plainly in *StorageTek:*

> 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"[8]

§1201(a) is the trafficking section of the US Copyright Act, similar to our §116A. The court here is quoting from its earlier decision in *Chamberlain,* which lays out under what conditions trafficking in circumvention devices can be illegal:

> A plaintiff alleging a violation of §1201(a)(2) must prove: (1) ownership of a valid copyright on a work, (2) effectively controlled by a technological measure, which has been circumvented, (3) that third parties can now access (4) without authorization, in a manner that **(5) infringes or facilitates infringing a right protected by the Copyright Act,** because of a product that (6) the defendant either (i) designed or produced primarily for circumvention; (ii) made available despite only limited commercial significance other than circumvention; or (iii) marketed for use in circumvention of the controlling technological measure.[9]

At the moment, Australian law requires that a TPM 'prevent or inhibit infringement of copyright', but it does not require that the circumvention device 'infringe or facilitate infringement'. The difference is subtle, but critical.

A technological protection measure is often created with multiple roles: as well as preventing or inhibiting copying, it could impose other restrictions, such as region-encoding. A device (or software) which overcomes the TPM to overcome the region-coding, but in *no way infringes or facilitates infringement of copyright*, will nevertheless fall foul of Australian law.

Linux Australia is particularly concerned that these laws might allow arbitrary restrictions of who can access legitimately-purchased copyrighted works. Imagine you purchase some music, only to find that the software which plays it is only available for Microsoft Windows. You run Linux on your computer instead, so you would expect to find equivalent Open Source software to play this music. If anti-circumvention law bans Open Source developers from creating and distributing our own equivalents of software which exists for Windows, we cannot help you. If this happens often enough, you will be forced to abandon Linux, even if it is superior in all other respects.

[8] *StorageTek*, pg.19
[9] *Chamberlain*, pg. 42

Hence we believe that Australian law should be drafted so that a copyright owner wanting a device banned be required to show that the device infringe, or facilitate infringement of copyright.

5 Australian Law Needs These Qualifications, Too

Australia is in a similar position to the United States before the *Chamberlain* decision, in that we do not have these limitations explicit in our Act. It is not clear whether Australian courts will reach a similar conclusion to US Courts of Appeal—and there will be considerable uncertainty until case law emerges (which happens slowly). Unlike US Courts, Australian courts cannot turn to 'First Amendment' or constitutional limitations on copyright in order to ground a limited interpretation of provisions, as the US Court of Appeals for the Federal Circuit did. On the contrary, Australian courts have often taken a broad reading of copyright owners rights.

In *Chamberlain,* the plaintiff argued that US anti-circumvention law does not contain these qualifications as they did not appear plainly in the text, and the identical argument could be made in Australia. So it is worth quoting from the decision, in which the judges rejected that construction "in its entirety", in large part because of the terrible implications for competition:

> [...]the broad policy implications of considering "access" in a vacuum devoid of "protection" are both **absurd and disastrous.** [...] Chamberlain's proposed construction would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted 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, Chamberlain's construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies[10]

The US case law resulting from these cases helps us to see a way to draft our own laws in a way which avoids similar litigation. Without deft drafting, some brave business in Australia will have to gamble on obtaining a similar result. This risk casts a shadow over competition.

[10] *Chamberlain* pg. 37

6 Region-Free DVD Players Also Under Threat

The government has stated on several occasions that they have no intention of banning region-free media players:

> In terms of regional coding itself, if a person is playing a legitimate, non-pirated product, the government's intention would not be for that to fall foul of the laws in relation to technological protection measures.[11]

If our law does not clearly state limitations equivalent to those imposed by the US court system, it is difficult to see how this commitment would be met, unless the government simply relies on copyright holders not enforcing the rights given to them under the Copyright Act.

6.1 A DVD Player is a Circumvention Device

The encryption on a DVD is clearly a technological protection measure. As previously stated, Australian law does not link the definition of "circumvention device" to some copyright infringement or facilitation, as the US case law has done. This makes every DVD player a "circumvention device", as they have no purpose other than accessing DVDs:

> *circumvention device* means a device (including a computer program) having only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of a technological protection measure.[12]

6.2 A DVD Player Needs Authorisation

If a DVD player is a "circumvention device", then it can only be distributed, sold, advertised and imported with the "permission of the owner or exclusive licensee of the copyright in the work or other subject matter"[13]. Again, without a court decision like that in the United States, declaring that "Copyright law itself authorizes the public to make certain uses of copyrighted materials", DVD players are only legal with the explicit approval of media companies.

[11] Mr. Simon Cordina, Acting General Manager, Intellectual Property Branch, Department of Communications, Information Technology and the Arts, before the Senate Select Committee on the Free Trade Agreement Between Australia and the United States, 18 May 2004

[12] Definition from *Copyright Act, 1968* taking into account amendments up to Act No. 45 of 2005

[13] *Copyright Act, 1968* §116A(1)(b)

This permission comes from the DVDCCA, a consortium of media companies which controls DVD licensing. Linux Australia has not sought such permission ourselves, but we understand that the contract one has to sign includes requirements that any DVD players respect such things as "unskippable" zones on DVDs and region encoding in return for documentation on the DVD format and method of decoding.

It seems extremely likely that DVD manufacturers have violated the terms of their contract by supplying "region-free" DVD players. This in turn implies that they do not have authorisation, and hence those distributing such DVD players in Australia are violating §116A (1)(b)(ii) through (1)(b)(v).

Under our AUSFTA §17.4.7(a) obligations, these violations require criminal penalties, as it is being done "for purposes of commercial advantage or financial gain". Making region-free DVD players even more illegal is not the government's stated intention, and thus should be clearly avoided.

7 Tuning our Copyright Legislation

It is clear that many large copyright holders want region encoding and other extra-legal protections, even if they choose not to enforce them for now; they exist in DVDs, computer games and *both* proposed successors to the DVD format. If evading them is not clearly allowed (or outright banned), these historically-active litigators can be expected to apply pressure to suppliers, and even individual users.

Nonetheless, we must ensure that copyright holders can effectively use these laws against the large-scale copyright infringers who are its intended targets, while drawing a clear line protecting competition from spurious lawsuits. The US case law has provided guidance on how to do this, and clearly Australia would not be violating the Free Trade Agreement to follow their example.

On the issue of authorisation, §116A requires permission of the copyright holder. Clarifying that this permission is implied, or not required, for mere access, would assist future judgements. This could be done as follows:

> No permission is required for activities which do not affect the rights of copyright holders as detailed this Act.

On the question of circumvention devices which do not infringe or create infringement, it would be sufficient to append a qualification to the definitions of "circumvention device" and "circumvention service":

> *circumvention device* means a device (including a computer program) having only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of an technological protection measure *to violate, or facilitate violation, of a copyright.*
>
> *circumvention service* means a service, the performance of which has only a limited commercially significant purpose, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of an technological protection measure *to violate, or facilitate violation, of a copyright.*

8 Conclusion

The United States, through the painful process of litigation, has tuned their law to avoid the worst abuses of anti-circumvention laws. No doubt, this process will continue, but we are cautiously optimistic that competitive software can exist under these laws.

Australia's laws have yet to go through significant litigation, and it is unclear that we will end up with the same protections. Australia's slower rate of litigation means that the issue will be undecided for years, possibly decades. This risk makes Australia less attractive to Open Source software deployment and development, for which we currently enjoy a world-class reputation.

The upcoming changes to this section of the Copyright Act, required by our FTA obligations, create an opportunity to avoid this messy and uncertain process by directly aligning our laws with the United States on this issue. Let us avoid any possibility that our laws be "absurd and disastrous".

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