To the Joint Standing Committee on Treaties.

We, Linux Australia (an open and representative group of Free and Open Source Software users and Developers) are writing to express our concern that Chapter 17 of the AU-US Free Trade Agreement will grant unprecedented monopolistic powers to technology companies looking to remove any chance of competition in their market.

The United States has seen their DMCA legislation used to stifle fair competition and, the creation of interoperable products and to severely limit a consumers right to fair use. With the Copyright Amendment (Digital Agenda) Act 2000 (Cm), Australia already has some of these laws. We ask you not to support Chapter 17 of the FTA, which makes it harder for us to correct the mistakes already made.

Consider a case under normal law. If a car company was to make the nozzles for refuelling cars different in each state, and have them incompatible, so that cars bought in one state could not be refuelled in another there would be outrage - and rightly so. If you were to establish a business adapting fuel nozzles, that would be clearly in the interests of competition, and hence consumers. Yet, we make it a crime to fix your Australian bought Playstation to play games you bought in Japan [SONY].

The added hardware, a "mod-chip", needed to do this also has the side effect of allowing the Playstation to play copied games. The activity of pirating games is wrong, and is punishable by the Copyright Act 1968 (Cth). We do not need new laws to make pirating illegal.

Professor Allan Fels (former ACCC chairman) said at the time of the original ruling on mod-chips: "The ACCC has long believed that region coding is detrimental to consumer welfare as it severely limits consumer choice and, in some cases, access to competitively priced goods."

Indeed, Chapter 17 of the FTA goes even further than current law: banning the use of any "circumvention device" and defining a circumvention device as anything with circumvents an **access control** or copyright protection mechanism. Previously only trade in such devices was banned, and the complaint had to show that there was no significant commercial purpose of a device other than to circumvent copyright.

Chapter 17 of the FTA will lock Australia in to giving companies these unreasonable market protection measures which **no other** market sees.

Please see our online resources for more information: http://www.linux.org.au/fta/

Written by Stewart Smith, Linux Australia Vice-President.
Authorized on behalf of the Linux Australia Committee.

About Linux Australia: Linux Australia (http://linux.org.au) 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 the wildly successful Linux.Conf.Au conference series - see http://www.linux.org.au

[SONY] Sony wins appeal on AU mod-chip decision:
http://www.zdnet.com.au/news/security/0,2000061744,20276709,00.htm

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Linux Australia is deeply concerned about the AUSFTA Article 17.9 on Patents:

> 1. Each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application.

The United States and Australia currently recognise patents on computer software, through various court cases in the 1990s. Europe explicitly disallows patents on pure computer software: attempts to alter this have been met with fierce resistance by small and medium businesses in Europe, particularly Open Source software developers and users. 300,000 people signed the petition last year to the European Parliament to protect software from patent monopolies.

We must maintain flexibility to limit such patents, especially when we consider their effects on Australian non-IT businesses. A survey conducted by Boston-based Forrester Research in February 2004 found that almost 50% of Australian small businesses are currently using Open Source Software and a further 14% plan to do so within the next year. Open Source software is distributed by a collaborative network of users and developers: in particular, there is no revenue model for funding lawsuits or royalty payments. The only use of patents against such technology can be to eliminate Open Source projects as competition, reducing consumer choice and doing significant damage to Australian competitiveness and infrastructure.

This has not yet been a problem in Australia, as we currently have only a trickle of software patents, unlike the estimated 45,000 a year granted in the United States. Note that Microsoft in particular, have not ruled out a patent attack on various Open Source competitors (in many markets, their only real competition) [REGISTER]

The damage of software patents goes beyond Open Source: a number of studies have indicated that software patents are reducing innovation[BESSEN]. The following is the position of US-based Oracle Corporation, the second largest software company in the world[ORACLE]:

> The U.S. software industry has evolved to a multi-billion dollar industry that leads the world in productivity, and accounts for substantial portion of U.S. GNP. The software industry has advanced the efficiency of other industries through the proliferation of computing and computer-controlled processes. All of these gains have come prior to the application of the patent process to software, and consequently without patent protection for software. There is no justification for a policy that would not only drain capital resources (which are better spent on software development) into patent applications and other legal fees, and also actually serve to reduce innovation by limiting the availability of previously-developed techniques.

Mr. William Gates III, the co-founder and Chairman of the world's largest software company, Microsoft, says the following of patents in the software industry [EFFQUOTE]:

> If people had understood how patents would be granted when most of today's ideas were invented and had taken out patents, the industry would be at a complete standstill today.

Clearly, there is controversy over this class of patents: if they are bad for Europe, which does have major software interests, they are certainly worse for Australia, which has no major local software companies. This clause guarantees continued protection for US-based software companies operating here, and I urge the committee to reject it.

Written by Paul 'Rusty' Russell, Senior Linux developer.
Authorized on behalf of the Linux Australia Committee.

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[FORRESTER] Forrester: More firms using open source
http://www.linuxworld.com.au/index.php/id;600985259;fp;2;fpid;1
[REGISTER] Microsoft aiming IBM-scale patent program at Linux?
http://www.theregister.co.uk/content/4/34391.html
[BESSEN] An Empirical Look At Software Patents
http://www.researchoninnovation.org/swpat.pdf
[ORACLE] Oracle Corp. Position on Software Patents (they oppose):
http://www. eff.org/IP/oracle_patent_ofc.testimony
[EFFQUOTE] Bill Gates 1991: Patents exclude competitors, lead industry to standstill
http://swpat.ffii.org/archive/quotes/#bgates91

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I don't want my friends to be arrested. I certainly don't want to be arrested. Yet the Intellectual Property provisions of the AUSFTA contains laws which mirror those used to arrest programmers in the United States. This is of far more concern to me that the usual subtleties of Intellectual Property law.

At the time of his arrest, Dmitry Sklyarov was a 27-year-old Russian citizen, Ph.D. student, cryptographer and father of two small children (a 2-1/2 year old son, and a 3-month-old daughter).

Sklyarov helped create the Advanced eBook Processor (AEBPR) software for his Russian employer Elcomsoft. According to the company's website, the software permits eBook owners to translate from Adobe's secure eBook format into the more common Portable Document Format (PDF). The software only works on legitimately purchased eBooks. It has been used by blind people to read otherwise-inaccessible PDF user's manuals, and by people who want to move an eBook from one computer to another (just like anyone can play a music CD in their home stereo, a portable CD player, or in the car).

Sklyarov was invited to a conference in Las Vegas, where he spoke on a topic from his PhD thesis: particularly, how poor the encryption used in Adobe eBooks was. Adobe Systems was, at that time, attempting to convince publishers of the security of their eBook software. At their behest, Dmitry was arrested after his presentation, and charged with distributing a product designed to circumvent copyright protection measures: he faced up to 25 years in gaol. After immense pressure, including Adobe issuing a statement withdrawing their support for the arrest, he was allowed to return home to his family Russia after six months, under an agreement which will see all criminal charges dropped in return for testimony against his employer.

This case illustrates the serious problems with these laws. Sklyarov did not commit any copyright violation, nor steal trade secrets, nor commit any crime in his home country. Nonetheless, his case was brought to the attention of the FBI by a company which felt threatened by his research and development: the message to developers trying to inter-operate with other products is clear, and several other research publications have since been suppressed.

In Australia, Linux Australia runs a high-profile annual conference, linux.conf.au, which attracts attendees from around the world to discuss Linux and Open Source development. We do not wish to be boycotted due to ill-considered laws. We also rely on reverse-engineering to make programs which run on Linux, which are compatible with common programs: this promotes competition and must not be outlawed if we are to have a free market.

Our laws in this area have some similar problems to those in the United States, but we must be able to fix them in the case of demonstrated abuse like the above, when they prove themselves anti-competitive. Locking us in to more extreme laws than we already have, as the AUSFTA's Intellectual Property provisions do, is strongly against Australia's best interests.

Written by Paul 'Rusty' Russell, Senior Linux developer.
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Dmitry Sklyarov/Elcomsoft FAQ:
http://www.eff.org/IP/DMCA/US_v_Elcomsoft/us_v_elcomsoft_faq.html

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Chapter 17 of the recent AUSFTA treaty contains particularly worrying demands for strengthening and locking in harsh Intellectual Property laws. I humbly submit that these laws are ill-suited to any country, and particularly Australia, and I have chosen a real example to demonstrate this point.

In 1997, Computer Science students at École Centrale Paris developed a set of video display programs, called Videolan, running on the Linux Operating System (a popular "Open Source" competitor to Microsoft Windows). Thanks to a small utility called DeCSS, released in 1999 by Jon Johansen, and some hard work on their part, they can play DVDs with their software: the students are no longer dealing with an abstract computer science problem, but actual sound synchronisation, image display, menu options and other real-life problems presented by the use of genuine DVDs owned by the students. In 1999, they released this project to the world under an Open Source licence, so that others can use and develop their software.

In 2004, the project won the builder.com Open Source award: the project is very popular, and now has developers both at the school and in the wider Open Source community, in twenty different countries. Open Source software in general is increasingly important to Australia.

This software is illegal in the United States. At the request of the United States, Jon Johansen, the developer of the software which decodes DVDs for Linux was indicted in Norway. Jon simply wanted to be able to write a DVD player for Linux, as none existed. After four years and two trials in Norway, both of which exonerated him, the case was closed.

The United States New York District court has ruled that DeCSS is illegal under the Digital Millennium Copyright Act (DMCA), which makes it a crime to "circumvent" copyright protection systems, regardless of motive. The encryption on a DVD is regarded as a copyright protection system: even though you own the DVD and the DVD player, you are not allowed to read the contents of the DVD. Needless to say, content companies love the control that this law gives them, which far exceeds the restrictions of copyright itself.

Australia has a seldom-used law (Digital Agenda Act) which is similar, yet explicitly contains reservations designed to shield valid circumvention from being prohibited. This law has been opposed by the ACCC and others in the past, and probably needs some more tuning, but the AUSFTA treaty strips away many of the current exceptions and delivers the odious and much-resented US anti-circumvention laws to our shores. It will also ensure that DVD players are one area where Open Source alternatives cannot compete with Microsoft Windows. I imagine that there will be numerous others in a few years' time: banning competition to a convicted American monopoly is not in Australia's interests.

As a Linux user, I beg that the committee recognise that this ill-considered section of the treaty will make playing DVDs on Linux illegal, making me a criminal. I do not believe that this is in Australia's interests, either.

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DeCSS Litigation Timeline:
http://www.ipjustice.org/publications/decsstable.htm
Builder.Com Open Source Awards 2004
http://builder.com.com/5100-6375-5136135.html
Anti-DMCA Frequently Asked Questions
http://anti-dmca.org/faq_local.html