

To: The Senate FTA Committee

I have been reviewing the Intellectual Property chapter of the AUSFTA, as a prominent Australian software developer and international conference speaker. I have also reviewed the recommendations of the recently-published Digital Agenda Review Report and Recommendations.

My concern in this area stems from the well-documented use of anti-circumvention provisions in the United States, which have been used to ban production, distribution and use of Open Source (ie. freely available) DVD playing software, which I need to use to play DVDs on my laptop. My laptop is one of the 2.8% which run Linux instead of Microsoft Windows: indeed, developing Linux has been my career since 1998. We built, and share freely, all the software you expect on a modern computer, and its popularity is growing rapidly.

The Digital Agenda Review contains one recommendation (recommendation 17) which directly effects me:

That the definition of TPM in section 10 of the Act be amended so as to accord with the interpretation favoured by Sackville J in Stevens, at first instance.

That the permitted purposes in section 116A(3) be amended so as to clearly allow any supply or use of a circumvention device or service or any use or exception allowed under the Act, including fair dealing and access to a legitimately acquired non-pirated product.

The first part refers to clarifying the definition of anti-circumvention covered by the Act: that it be "*limited to measures to protect or control rights only that fall within copyright*". This means that companies would not be able to use the provisions except to defend copyright. Contrast this with Lexmark, a printer manufacturer in the US, who used their anti-circumvention provisions to sue an after-market printer toner supplier. Or Chamberlain, the US garage-door manufacturer who sued Skylink technologies who make a universal garage door opener. (Neither case, so far, has been successful).

The second part of the recommendation would also explicitly allow me to write and distribute DVD playing software for Linux without fear of litigation. It would also allow me to use an Open Source program to play music downloaded from Apple's iTunes online music store (Apple consider Linux a competitor, and do not supply an iTunes player for Linux). Most importantly, I would feel confident that we in the Linux world could continue to offer the high level of open, reliable and fully-featured software our users expect, without fear of litigation by competitors.

Unfortunately, the AUSFTA takes our laws in this area far away from this ideal: restricting the coverage of these laws purely to copyright infringement is not allowed. Indeed, the coverage becomes broader, not narrower. Article 17.4 paragraph 7 makes liable anyone who:

(i) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work

That would be me, playing a legally purchased DVD on my legally purchased laptop. Given that eight major motion picture companies have won court cases in the US against websites distributing this freely available player which I need, this issue is not academic.

A review of the uses of the anti-circumvention clauses in US law, which the AUSFTA seeks to extend to Australia, shows that these laws are increasingly used to prevent competition or consumer choice, not to protect copyright. In the AUSFTA clause above, the explicit reference to banning access rather than banning copying suggests that this is not an unintentional side-effect of these laws, but to many large corporations it is a core component of them: to expand control far beyond copyright. Being a net IP consumer with the US, the damage to Australia from banning consumer choice is even more clear-cut than the damage to competition within the US.

I urge the committee to follow the recommendations of the Digital Agenda Review, which had a wide consultation process, and I recommend strongly against laws which might see some of our top software professionals leave for Europe or face trial.

While considering the AUSFTA's harsh strengthening of these provisions, I ask you to consider carefully the following from paragraph 1.6 of the Digital Agenda Review:

It has not been demonstrated, in any meaningful sense, that the objective of the Digital Agenda Act to provide a practical enforcement regime has not been met.

I have enclosed a copy of the Electronic Frontier Foundation's "Unintended Consequences: Five Years under the DMCA" document, as an illustration of the potential effects of matching US law in this area.

Thank you for considering this submission,
Paul 'Rusty' Russell.

Linux Australia committee member, Australian Linux Conference Founder, Senior Linux Kernel Developer.