Supplementary Submission

Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America

I was invited by the Acting Chair of the Committee to provide a supplementary submission, due to time constraints on my appearance on Monday 17 May 2004. I hope this submission will shed light on some of the dark corners of this debate. I will open with our Recommendation which I did not have time to present, and go on to address questions raised in the discussion.

Rusty Russell,
Linux Australia.

Recommendation

The current FTA text in 17.4.7 already constrains the logical direction of Australian Law by disallowing recommendation 17 of the Digital Agenda Review, which recommended introducing a clear new exception to allow for fair dealings and access. This exception is not on the closed list allowed by the FTA. It also limits how we can improve the law in future. We have also previously indicated that the text constrains US laws, particularly the DMCRA Bill (a bill designed to correct some of the mistakes of the deeply flawed DMCA) being considered by the US Congress. As a minimum change, a side letter containing text such as the following would restore this flexibility:

> *Notwithstanding the text of Article 17.4.7(e) and (f), each Party may provide exceptions to Article 17.4.7(a)(i) and 17.4.7(a)(ii) to allow the use and/or supply of circumvention devices or services which allow or enable any use of copyright works or subject matter for non-infringing purposes, including fair use (or fair dealing), and access to legally obtained works.*

This text is derived from the Digital Agenda Review's Recommendation 17, and would allow important parts of that recommendation to be enacted in Australian law now or in the future, and would explicitly allow us to exclude region-encoding devices from protection (as DFAT have indicated is the government's intent).

Pirates Everywhere?

We are talking here about organised criminal activity, not Johnny at the end of the street
- Ms Jenkin, CEO IEAA, Monday 19 April JSCT Hansard (TR99)
Our focus is on true counterfeiting being organised at a significant level.
- Ms Jenkin, CEO IEAA, Monday 19 April JSCT Hansard (TR102)

The Open Source community relies on good copyright law to enforce our software licenses; we are not seeking to legalise piracy. We hold the creation of a work in high regard.

While the focus of copyright owners may be on true counterfeiting, the problem for computer programmers and the Open Source industry is that the laws required by the FTA range far more broadly; in addition to "pirating", competitive activities will be covered by these overly-broad laws. We've made it fairly clear that this "scorched earth" approach to copyright law is causing real collateral damage to legitimate interests by banning "unauthorized" competition, and generally granting copyright owners powers far above and beyond "normal" or traditional copyright, and creating new, legal barriers to entry across an expanding field of technology.

It is no answer to say that the law will only be enforced against organised criminal activity or counterfeiting. To avoid breaking the text of the law, competitors - like open source programmers - will have to refrain from a much wider range of activities.

As when any new competitor emerges in an industry, the current big players get nervous. Open Source is here to stay, and we want a fair playing ground from Australian copyright law; the damage these laws do to competition is not entirely accidental, as we indicate below.

No Interest in Preventing Access?

Copyright does not prevent access to works.
Copyright owners have no interest in locking up their material. It is to encourage them to make it available on reasonable terms that copyright law exists.
- Mr Fraser, CEO Copyright Agency Ltd, Tuesday 4 May Senate Ctte Hansard (FTA37)
Locked up in the sense that you cannot reproduce them, but you have access to them.
- Senator Brandis, Tuesday 4 May Senate Ctte Hansard (FTA29)

Mr Fraser makes an excellent point about copyright law: historically, it has not protected access, but copying. We think of a book, which we can borrow from a library, read aloud to our kids, skip to the end, highlight passages or use it as a doorstop. We hope that, as Mr Fraser says, copyright will provide copyright owners with the maximum incentive to broadly distribute their works. Unfortunately, this Utopian view of how copyright should work (which we share) falls apart once we talk about banning circumvention of access controls, as the FTA does.

Copyright owners have indeed shown great interest in locking up their material; DVD manufacturers do it with region-encoding, Sony do it on their PlayStations which are both region-locked and cannot play non-Sony-approved games, Universal Studios did it when they prevented the distribution of DeCSS in the United States (used to play DVDs on Linux). Access control is a major market opportunity: some DVDs have sections that cannot be skipped, and some already use this to force viewing of previews. A little imagination, along with strong protection laws, open a huge market to charge for the privilege of access previously considered entirely outside copyright law.

Allowing a copyright owner to forbid their work being viewed by certain users, or in certain ways, goes directly against the intent and spirit of copyright law, because *these provisions go well beyond the concept of property*. If I sell you an apple you can do what you like with it after I've sold it to you; I can't restrict your use. These provisions implement monopolies over after-sale use, and therefore should be fully justified *before* being implemented. Denying people access to legally bought works based on the method they use to access them does nothing for consumers except deny them control over everyday actions.

The ACCC have argued repeatedly that companies should not be preventing access in these ways. That has little worth, if we are simultaneously passing laws guaranteeing they can do just that! Given the uses which we know copyright owners are already making of access control technologies, and that various interests have won court cases here (Sony v. Stevens) and in the United States (Universal v. Reimerdes) to expand these laws, it cannot be argued that this legal protection is an unintended side-effect of some "war on piracy".

Only Bad People Need To Circumvent?

...to my mind, it really has not been demonstrated that there is this need to gain access by circumventing technological protection measures. It really should not be necessary at all, given that the whole purpose of the creation of copyright material is to make it available.
- Mr Gonsalves, Member, Business Software Association of Australia, Monday 17 May Senate Ctte Hansard (FTA20)
The final point is that there has really been no evidence of any real need for anticircumvention devices to be employed. So, in the absence of credible evidence, in our view the position should be that circumvention devices should be prohibited, and that exceptions should be narrowed.
- Mr Gonsalves, Member, Business Software Association of Australia, Monday 17 May Senate Ctte Hansard (FTA37)

People involved in that inquiry were asked about the current use of anticircumvention measures, and little or no evidence was put forward in that review about why those provisions are needed.
- Ms Baulch, Executive Officer, Australian Copyright Council, Monday 17 May Senate Ctte Hansard (FTA9)
Rather than having quite broad 'permitted purposes', which were based on great fears and a lot of speculation, which have not yet been borne out--they were not shown to be borne out by the Phillips Fox review–this will instead be dealt with by the inbuilt review mechanism in the free trade agreement.
- Ms Baulch, Executive Officer, Australian Copyright Council, Monday 17 May Senate Ctte Hansard (FTA35)

> Copyright owners have few incentives to allow or facilitate uses which, under the Copyright Act, are allowed for free: for news, for personal research or study, or for criticism and review. Copyright owners have few incentives to allow people to make interoperable - and possibly competing - products like alternative games using the Sony PlayStation, or competing computer programs like media players. In these situations, as in others, circumvention is needed, as we have repeatedly shown.
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> In fact, the Digital Agenda Review did receive submissions on the US banning of the DeCSS Open Source DVD-reading software, and from the ACCC on the Sony case. Both were mentioned in their report, and clearly taken into consideration in their Recommendation 17. Indeed, the Digital Agenda Review specifically affirmed the importance of the permitted purposes exceptions, through its recommendation 19 - which recommended copyright owners be prevented from contracting out of these exceptions.
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> Recommendation 17 was used by both sides of the argument as supporting evidence. This is because it contains three parts relevant to circumvention: narrowing the definition of a Technological Protection Measure, clearly excepting supply or use for fair dealing and access, and extending the law to prohibit use *for an infringing purpose*. Explicitly, all parts of the recommendation must be applied together.
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> As I stated in my appearance, our concern is with the massive increase in breadth of these laws outside the box of copyright infringement, not their strength inside that box. Hence we don't have a position on use of circumvention devices for infringing purposes, and we explicitly support the adoption of Recommendation 17 (see Recommendation)

Competitive Products

I do not think that it prevents development of competitive products.
- Mr Gonsalves, Member, Business Software Association of Australia, Monday 17 May Senate Ctte Hansard (FTA38)

> The best evidence of whether competition is likely to be affected by the FTA is to look to the effect of the DMCA - the law on which the provisions are modeled - in the United States. Open Source DVD playing software is no longer developed in the United States; the three significant projects are developed in Europe; development has already been effected. At least one of these has been used in a (commercial) DVD player. Xandros, a US-based Linux distributor, apologises to their customers when they try to play a DVD, because they cannot ship the decoding software for legal reasons. Hardly on par with Microsoft Windows or the Apple Macintosh.
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> It's clearly a real issue, and goes directly against the idea of free trade and open markets.

You're OK If You're Non-Infringing?

I think any circumvention device could be used provided it is just to get you access to the material, and you could use it lawfully for any non-infringing purpose. All this says is that you have to show that you need to use it for the non-infringing purpose.
- Mr Fraser, CEO Copyright Agency Ltd, Monday 17 May Senate Ctte Hansard (FTA16)

> If this were the case, then the text would simply note that uses of circumvention devices to access legally purchased non-pirated work are allowed; that would establish that you can "use it lawfully for any non-infringing purpose" as Mr Fraser suggests.
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> The text does not allow such an exception (17.4.7(e)). It says that non-infringement is *not* a defence, and at best can only become one after an (expensive and protracted) procedure which then needs to be repeated every four years, and in which, presumably, various interests will be dedicating resources to oppose you. At worst, you won't get such an exception, and the fact that you didn't do anything wrong won't help you.

But Can't We Add Exceptions?

in the agreement there is a provision in relation to exceptions which allows new exceptions to be introduced, if the need is demonstrated, in relation to interested parties who claim that they are being locked out of copyright works unreasonably and not allowed to use copyright works for legitimate purposes.
- Mr Gonsalves, Member, Business Software Association of Australia, Monday 17 May Senate Ctte Hansard (FTA20)

But, importantly, it also allows for Australia to implement exceptions, which will reflect that balance between owners and users. In addition to implementing exceptions, there are also exceptions that we have actually already recognised in the agreement, particularly in relation to, say, innovation and software products. There is one in relation to allowing reverse engineering to develop interoperable products.
- Mr Cordina, Acting General Manager, IP Branch, DCITA, Monday 10 May Senate Ctte Hansard (FTA38,39)

> As noted above, exceptions can be introduced, once some non-trivial barriers have been overcome. However, the text makes it clear these limited exceptions can only be for made for *use* of a circumvention device. If you need to write software to circumvent an access control, or you need help to access a product, or you need to import a circumvention device to do so, we cannot create an exception for you (and note, such activities carry criminal as well as civil penalties). If anything more sophisticated than a felt pen or sticky tape is required for access, jumping through hoops to obtain an "exemption" doesn't help you. This mirrors the experience with the similar clause contained in the DMCA.
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> The exception 17.4.7(e)(i) referred to above by Mr Cordina, which allows interoperability of software, also exists in the US DMCA in similar form. It was not sufficient defense for Open Source DVD playing software in the United States, despite clearly being software, and having a clear purpose of interoperation with a legally purchased DVD (arguably not "software"). There is little reason to believe it will be sufficient defense here, and again, it seems it was not designed to be sufficient.

But If It Really Was A Problem, We'd Know Already?

...we believe that those concerns are unfounded. There is nothing in the FTA that would lead to that sort of result for the OSS industry.
- Mr Deady, Chief Negotiator, DFAT, Monday 10 May Senate Ctte Hansard (FTA37)
...but that has not been raised as a concern in all the discussions we have had with Australian industry in advance of this.
- Mr Deady, Chief Negotiator, DFAT, Monday 10 May Senate Ctte Hansard (FTA38)

> I believe we have made our concerns clear to this committee, at least, and to the Digital Agenda Review; it is unfortunate that DFAT did not seek our input before negotiations were concluded, but as a developing group of small businesses and individuals, we have had neither an active representational body nor the awareness of the need for one, until recently. We believed that the mounting evidence of the damage done in the United States would give negotiators sufficient motivation to resist imposition of similar constraints in Australia. Indeed, Google returns "www.anti-dmca.org" as the first entry when searching for DMCA; fifth on the list is the Electronic Frontier Foundation's DMCA archive, headed by their Unintended Consequences paper.
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> In particular, DFAT have implied that they currently believe that the implementation of these laws can leave room for circumvention for access purposes, which has been disputed by several lawyers reading the text. Certainly the US intended Open Source DVD players to be banned here just as they are in the US. Given that disputes can be based on the "spirit" of the agreement, as well as the text, it is hard to recommend too many word games in implementation if we adopt this treaty as stands.
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> Clarifying the text to clearly show the intent of the agreement can only benefit both the United States and Australia.

Isn't This Just About A Few Minor Products?

...a lot of the technological protection measures which are currently employed and are likely to be employed in the future are access control devices similar to the device in the Sony PlayStation case
- Mr Gonsalves, Member, Business Software Association of Australia, Monday 17 May Senate Ctte Hansard (FTA19,20)
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.
- Ms Harmer, Lead Negotiator, Intellectual Property, DFAT, Tuesday 18 May Senate Ctte Hansard (FTA91)

The FTA expands the definition of technological protection measure to cover anything which "controls access", which is what Mr Gonsalves is praising above, explicitly so it will cover "devices similar to the device in the Sony PlayStation case", which although supported by many US companies like the BSAA, is clearly against the stated intent of the current law, to prevent piracy.

Given Ms Harmer's statement above, and the ACCC's staunch opposition to Sony's use of region encoding PlayStation games to divide markets, it is clear why the Digital Agenda Review recommended narrowing the current definition of Technological Protection Measure, to something which "in the ordinary course of its operation physically prevent or inhibit a person from infringing or facilitating the infringement of a copyright work". This way, something which only controls access and doesn't protect copyright won't gain legal protection from angry users. Unfortunately, we are bound to the broader definition: Ms Harmer goes on to suggest that explicit exceptions could be added to exempt region encoding, but as discussed, this ability is insufficient.

One of the main US lobby groups behind Chapter 17 is the Motion Picture Association of America. The MPAA sees region coding as a central part of their marketing strategy: it is unlikely that the US will allow Australia to introduce such an exception without a fight. Chapter 17 has been drafted expressly with the interests of the MPAA in mind, so we should be cautious about suggestions that we can "draft around" these provisions.

Can We Define TPM So Access is OK?

I think this is an implementation issue and related to how the definition of technological protection measures is implemented in our legislation.
- Mr Cordina, Acting General Manager, IP Branch, DCITA, Tuesday 18 May Senate Ctte Hansard (FTA95)

This quote is a reference to whether circumventing "copy protected" music CDs to play them on a computer would be legal. DCITA seems to feel this definition has some room for improvement in implementation (I assume Mr Gonsalves will oppose such an narrow implementation, given his support above for the broadening of the definition). Even if this is true (unlikely, see previous page), and we can define around (say) DVD region encoding today by carefully defining "Technological Protection Measure" (TPM), it is insufficient for future variations.

This is because all technological protection measures which protect copyright, work by preventing access; so they will always prevent more than just making illegal copies. Giving blanket legal protection for anything which protects a copyright, gives protection for everything else they stow under this same umbrella, including region coding and other access controls. This is why the DA Review Recommendation 17, in addition to insisting the measure really protect copyright in order to gain legal protection, also provides clear exclusions for circumventing for fair dealing and access, *even if a device is a technological protection measure.*

Consider an example. Assume a new type of DVD, DVD2, is introduced. Instead of a simple number for each region, each region uses a completely different encryption system. Encryption systems are well-established in the US and already defined here, to be an effective technological measure; indeed, this encryption protects a copyrighted work, so it would be covered under current Australian law and the DA Review-modified definition, as well.

Making an Australian DVD2 player read US DVD2 disks would not be a simple matter of changing a region number, but entirely replacing the software inside the DVD player which reads and decodes the disks. Once again, this new software is clearly a "circumvention device" under the Copyright Act, the DMCA, the FTA text and even after the DA Review modifications. Without the clear exception for fair dealing and access which Recommendation 17 contains, I cannot write such software. I cannot give you such software. And after the FTA implementation, you won't be able to use such software; however, you'll only risk civil action, whereas I will also risk criminal charges.

Do Bad Laws Matter?

I had an image that we did have some sort of fair use arrangement in Australia.
- Senator Cook, Monday 17 May Senate Ctte Hansard (FTA9)

> The confusion over the legality of private copying among the committee was mainly an aside to the IP roundtable; indeed, Australians have no general "fair use" rights. But it provides some interesting insights, which apply here.
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> Since Australians do not have the right to tape TV shows for later viewing, but many Australians want to do just that, there is an obvious market. For the reasonable fee of $5 per month, copyright holders could grant explicit permission to tape and play back TV shows within the same household with a week (higher charges for cable TV would apply). A conservative estimate based on 1 million households would value this market at $60 million a year.
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> All that money is being lost to piracy! Why don't the TV stations start a licensing campaign to protect their rights? They could start with an amnesty for people who bought licenses, then begin enforcement gradually.
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> This doesn't happen, because the consumer backlash would result in the law being changed. The result: Australians have *de-facto* fair use rights, and only lawyers generally get upset about it. In the same vein, most Open Source developers considered us to have *de-facto* anti-circumvention rights for the purposes of access. That we have bad laws was a shame, but not a threat; if Open Source developers were sued or gaoled in Australia the flaws in the law would become so obvious that we could get the law changed.
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> In the US, these laws are a real threat; suing end-users has become an accepted technique for the Recording Industry Association of America, and companies such as Adobe have shown (with the arrest and charging of Dmitri Sklyarov) clear intent to use criminal provisions against programmers who have not pirated, nor encouraged piracy, but simply enabled interoperability.
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> The great fear among our members is that, once bound to this treaty, and unable to change our laws on risk of trade retaliation, these same companies will use these same laws in the same ways, in Australia. This fear is toxic to the industry: killing competition by small players in any areas which have the slightest potential for legal trouble. As the US experience has seen, that is an extremely wide field. The "Playfair" software, which allows Linux users to play their legally downloaded iTunes music collections, was threatened by Apple in the United States, and is now hosted in India. The original author of this software lives in the United States, and remains anonymous due to fear of these laws.

Sizing the Economic Damage

Measuring the potential loss due to the chilling of Open Source development in areas threatened by these laws is difficult, especially as the market is young and seeing exceptional growth. The recently-formed Open Source Industry Association has a business directory of around 70 companies: they estimate that there are around 500 SMEs doing Open Source nationally, employing around 1,500 people and having an annual revenue of around $100 million.

A large number of the current activities of this group are not threatened by these laws, but the laws do threaten the fastest-growing market: the Open Source desktop. Naturally, the Open Source desktop is unlikely to capture the entire market, perhaps 30% of new desktops by 2007. But other factors increase the effect: the increased efficiency of an Open Source desktop, the removal of licence-tracking and virus costs, the reduced outlay of Australian IT users (to US firms), price reductions and product improvements caused by increased competition, and the ability for local firms to capture more of the upgrade and support market.

Microsoft do not release revenues for Australia, which would give the most direct measure of market value. However, the PC market for Australia in 2002 is estimated at A$2.3 billion, and the PC business software market at $A4 billion (Euromonitor International); both are growing rapidly. Placing a value of $A1 billion a year on the home and business desktop software markets is probably conservative. The growth forecast for these areas is over 60% by 2007, giving a A$1.6 billion market.

Hence, I do not think it is unreasonable to place a conservative cost to Australia of A$500 million dollars per year on the suppression of Open Source Software in the desktop market through legal restrictions such as those required by Chapter 17 of the Free Trade Agreement.

Clarifications

I wish to clarify two mistaken impressions the committee may have from my appearance, based on reading succeeding hansards:

1. Although an active Open Source programmer, I have never personally written, sold or distributed a "circumvention device" which is likely to attract the wrath of any company. So I do not feel in immediate danger of arrest should these laws be passed, or even visiting the United States (although I continue to boycott US conferences). I have downloaded DeCSS from Europe to play DVDs on my laptop, which is clearly a criminal act under the FTA, but I am not a "key player": my arrest would serve little purpose and merely raise awareness and opposition.

   That said, some of my friends and associates *are* "key players" in Open Source developments which are covered by these laws. Thousands of Australian businesses rely on their software in everyday business activities, and they do compete with significant commercial interests. Many could not afford to defend a lawsuit if it were brought under anti-circumvention provisions, and the 25-year gaol sentence which threatened Dmitri Sklyarov in the United States also looms large. I would certainly never work on such a project in Australia, no matter how tempting, should these laws come into effect.

   Let me make this clear: people in the Open Source industry feel directly threatened by the laws required by the FTA. We have seen threats issued against Open Source developers in the United States, and we fear the same thing here. This kind of fear, and this kind of uncertainty, as I have already noted, is toxic. It drives people from the industry, and it drives people from engaging in innovative activities. And that is a real shame, because currently in Australia we have some of the most talented, and innovative, Open Source developers of any country in the world.

2. My example of Google as a company which credits Open Source as a factor in its success was not meant to imply that these laws threaten Google. I was merely using this as an example of the effects of Open Source (Linux) in one marketplace, which could not be foreseen five years ago. Five years ago, the Linux server market was similar to the current Linux desktop market: less than 5% of market share. It could have been stopped by legislative barriers at that stage. Today it's everywhere, and one side effect was the emergence of Google.

   Open Source entry into the desktop market is most immediately threatened by these laws, as DVD and music players are expected by home users; without them we cannot fairly compete with the existing systems. If we allow US interests to block Open Source from a fair go in the desktop marketplace, how many googles will we lose in future?