To the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America,

My name is Michael Davies, a software developer living in the federal seat of Makin in South Australia.

While the AUSFTA brings great opportunities for various sectors of Australian industry, I am deeply concerned about how the Australia-US Free Trade Agreement (AUSFTA) will affect the local software industry, and specifically to the Open Source Software sector contained within.

Chapter 17 which deals with the "harmonization" of Intellectual Property (IP) laws between the USA and Australia (see http://www.aph.gov.au/house/committee/jsct/usafta/tor.htm, page 15), has broad implications on the software development practices afforded the local IT industry under current legislation. Changes in the areas of software patents and anti-circumvention under AUSFTA obligations could cause significant burden to the local IT industry, leading to Australia losing its competitive advantage as an exporter of innovative technology.

I have already made a brief submission on the topic of software patents to the Joint Standing Committee on Treaties (see http://www.aph.gov.au/house/committee/jsct/usafta/subs/SUB52.pdf ). I refer this committee to that submission for consideration.

On the topic of anti-circumvention I would like the committee to consider the purchase of a book covered by traditional copyright. The purchaser of the book is free to do with the book as he or she likes - you can use a magnifying glass to read it, burn it in protest, use it as a door stop, sell it to a friend, take it overseas, or have it read to you by a machine if you are blind. Unfortunately under the anti-circumvention obligations of the AUSFTA, you won't be able to do these things with an electronic book sold in Australia; you cannot circumvent anything which controls access, which places you at the whim of the manufacturer. This clearly is not in the best interests of consumers, but it also has a profound effect on the software development community as well.

As an advocate of the Linux computer operating system, I legally enjoy the results of programmers around the world that develop this "poster child" open source software product. I am able to buy a PC

from a local supplier, legally download a copy of Linux, and use it for all my computing needs. I am able to make modifications to Linux to improve it, or adapt it to the specifics of my computer hardware, and even to contribute those changes back for others to enjoy. Unfortunately under AUSFTA obligations I may not be legally permitted to do this in the future.

In the USA, their anti-circumvention legislation (the Digital Millennium Copyright Act, the "DMCA") has been used to protect market share and attack competitors more than it has been used to protect digital content creators. One example of this is a printer manufacturer that has used the DMCA to lock-out competing printer cartridge suppliers - clearly not the intent of the original legislation.

It isn't hard to see how this could be extended to cover any piece of commodity PC hardware, since most hardware sold today has a software component. Hardware manufacturers, with the support of DMCA-style legislation, could prevent the development of 3rd party software drivers for their hardware. This would dramatically affect Linux and other Open Source Software projects where many drivers are not created by the manufacturer, but rather by 3rd parties.

The recent review of the current Australian legislation in this area (see http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations , Recommendation Seventeen) suggests that the law should, "be amended so as to clearly allow any supply or use of a circumvention device or service for any use or exception allowed under the Act, including fair dealing and access to a legitimately acquired non-pirated product." This is diametrically opposed to the direction that the AUSFTA is proposing.

Any changes to anti-circumvention legislation to meet AUSFTA obligations should contain specific exemptions for the development of 3rd party software device drivers for Open Source software interoperability. Anti-circumvention legislation should only be allowed to be used to protect digital content, not enshrine monopolistic practices.

Another area of concern is how in the USA DMCA legislation has been used to prosecute a Russian computer security researcher, Dmitry Sklyarov, while he visited the USA to attend a conference (see http://www.eff.org/IP/DMCA/US_v_Elcomsoft/20010730_lessig_oped

.html for a full account). Despite not violating anyone's copyright Mr Sklyarov was prosecuted on the grounds that his research and the software product produced by his employer could have been used to violate copyright. This sort of persecution dampens legitimate research into security and discourages innovation to protect flawed digital locks and keys. What is needed is more research that is protected, not opposed, by legislation to improve this area of knowledge. Australian software developers should not have to fear gaol while developing software for legitimate purposes.

Without careful consideration, the AUSFTA could bring in legislative changes that discourage innovation and diversity, and provide a legal framework that encourages anti-competitive practices, to the detriment of Open Source Software and more generally the Australian IT industry. In a broader sense, these AUSFTA obligations favor current IP stakeholders, which are typically large multi-nationals, and discriminate against smaller Australian companies and individuals.

I urge this committee to recommend exemptions for Open Source Software in the revision of Intellectual Property law, and to restrict the broad adoption of software patents.

Thank you for your consideration,

Michael Davies.