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Ms Jackie Morris
A/g Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: LegCon.Sen@aph.gov.au

Dear Ms Morris,

Provisions of the Copyright Amendment Bill 2006

1.   Summary

1.1   OSIA is grateful for the opportunity to comment on this Bill.

1.2   Open source businesses aggregate components from possibly thousands of sources. It is not feasible for a business to rigorously check copyright ownership on each component. It would be poor policy to require the replication of this checking at each level of the distribution chain.

1.3   The Copyright Act includes specific provisions to protect copyright plaintiffs from the onerous burden of proving *their own copyright ownership*, yet punishes copyright defendants on the basis that they have some greater knowledge of that same ownership.

1.4   Legitimate purchasers of copyrighted material should be able to rely on indications of ownership and licence terms which accompany that material.

1.5   It should be a defence to the criminality provisions and infringement provisions that a business owner complied with an approved industry code of conduct for checking copyright/infringements.

1.6 In respect of the interoperability exceptions to the TPM prohibitions:

(a) by failing to permit interoperability between software and user data the Bill fails to support a free market for software. The current proposed structure remains unworkable as it does not address the main need for access, which is the ability to read a customer's existing data in order to sell them a competing product;

(b) there should be a clear statement that interoperability between two programs includes interoperability between a program and data produced by another program as set out in Recommendation 15 of the report titled "Review of Technological Protection Measures Exceptions" tabled by the House of Representatives Standing Committee on Legal and Constitutional Affairs on 1 March 2006;

(c) the requirement for the relevant act to be done in respect of a computer program should be removed;

(d) the references to "*the information will not be readily available to the person from another source when the act is done*" do not reference anything in the balance of the section and should be removed;

(e) the earlier structure (as indicated in the Explanatory Memorandum – ie the exception be couched by reference to s 47D) is unworkable in that it provides a right to get information, but prohibits the actual act of interoperation.

1.7 The Bill is complex and relies on subtle terminology. The Bill introduces broad catch all phrasing to create criminal offences. Any exceptions must be clear if they are to be of practical value.

1.8 The legislation's failure to address the meaning of circumvent creates difficult problems of interpretation.

2. About this Submission

2.1 I am a director of Open Source Industry Australia Limited (OSIA). I make this submission on behalf of that company.

3. About OSIA

3.1 OSIA is a company limited by guarantee established in 2004 to represent the interests of the open source industry in Australia. All of OSIA's members are businesses. All of OSIA's members are copyright owners. The exploitation of copyright is a critical component of the business of all OSIA members.

3.2 OSIA membership comprises mostly SMEs from around Australia, but it also counts large organisations and several multinationals among its membership.

4. OSIA Members are Active and Successful Digital Publishers

4.1 OSIA's members are active and successful participants in the burgeoning digital publishing market. The operation of the typical OSIA member involves

the supply (including through electronic publication) of copyrighted material (mainly software and documentation). The typical member will also leverage the value of such material by providing high skill value added services in conjunction with that supply.

4.2   Our members include some of the most successful digital publishers in the world. For example, one of our members, MySQL AB, uses digital publishing for practically all of its material, including software and manuscripts. MySQL estimates that more than 10 million copies of its flagship database product are in active use as a result.[1] The popular package of open source software known as "Fedora Core" issued version 6 last week.[2] According to early reports 10,000 copies had been digitally published[3] within the first five hours of its release (incidentally, Fedora Core actively encourages the use of the Bittorrent peer to peer system for the digital publication of this material).

4.3   OSIA's members are active suppliers in the burgeoning electronic publishing market. OSIA believes that its members' experiences are that the market for electronic publishing of their materials is growing rapidly and that this is an exciting time to be part of that growth. OSIA does not believe that TPM legislation would provide any benefit to its members in their digital publishing endeavours.

5.   Our Digital Publications are Highly Capital Intensive

5.1   OSIA members use electronic publishing to publish highly capital intensive works. One popular product published by members is the GNU/Linux operating system. One popular variant of this system is known as "Debian" or "Debian Linux". *A review of that variant in 2005 gave an estimated cost to develop at US$8 billion (apparently estimated using year 2000 dollars).*[4]

5.2   To put this in perspective, the Lord of the Rings Trilogy, the most expensive series of movies produced to date, is estimated to have cost about US$300 million. OSIA members routinely digitally publish software the capital cost of which is at least an order of magnitude greater than that for films and several orders of magnitude greater than for music or books.

6.   Digital Products are Developed Openly, Rapidly Published

6.1   As a general rule, any person can, at any time, inspect the source code of the components comprising an open source system (OSIA is not aware of any exceptions to this rule, but it is conceivable that very small projects may not make their code available, or may make it available intermittently). In any

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1   MySQL publishes distribution information upon its press releases - "*The company's flagship product is the MySQL Server, the world's most popular open source database, with more than 10 million active installations.*" http://www.mysql.com/news-and-events/press-release/release_2006_41.html (dated 20 September 2006).

2   On Tuesday 24 October 2006.

3   See http://news.com.com/2061-10795_3-6129149.html.

4   "*Estimated cost to develop: 8,043,000,000 USD*" Amor-Iglesias, González-Barahona, Robles-Martínez, and Herráiz-Tabernero "*Measuring* Libre *Software Using Debian 3.1 (Sarge) as A Case Study: Preliminary Results*" UPGRADE, Vol. VI, issue No. 3, June 2005, at page 15 (available from http://www.upgrade-cepis.org/issues/2005/3/upgrade-vol-VI-3.html).

event once a project is published, the source code will be generally available. Any person who believes any code is infringing has ample opportunity and access to determine whether or not the open source code is infringing.

6.2   Once settled (typically this involves a protracted alpha and beta test release process), open source software is digitally published extremely rapidly. Tens of thousands of copies will typically be made within the first handful of days following a release.

6.3   Given that early access is available and is available on a continuing basis, coupled with the extremely rapid digital publishing that follows, a person who wishes to bring an action should not be able to sit on their hands until after publication in order to claim flagrancy damages.

7.   Open Source has Defeated Piracy

7.1   There have been a number of cases around the world relating to the piracy of open source software. That said, OSIA has no evidence to suggest that such piracy is anything other than isolated and occasional. No member has requested OSIA raise piracy of open source software as an issue. Further, no member has suggested they have lost revenue through piracy of open source software. OSIA has no reason to believe that this situation is any different anywhere else in the world, nor in the past, nor do we expect it to change in the future.

7.2   We put the success of open source in defeating piracy down to the adaptation of open source businesses to the changed environment. OSIA believes that the world of ecommerce in content will arrive not by attempting to fashion the market to suit old business models. Rather, it will occur when market participants are forced to adapt to the new environment.

8.   Criminality Provisions, Particularly Strict Liability

8.1   In 2000 the House of Representatives Standing Committee on Legal and Constitutional Affairs reviewed extensive and detailed evidence attesting to the cost and difficulty involved in establishing ownership of copyright (Copycats review). It based its recommendation for the inclusion of specific presumptions as to copyright ownership on the difficulty involved in proving ownership.[5] Correct licensing requires correct identification of copyright holding as a prerequisite. The difficulty of proving ownership is also something which falls on value added resellers and integrators such as our members.

8.2   Submissions to the Copycats review by some of the largest and most vocal copyright holders clearly stated that establishing a copyright holding beyond reasonable doubt is an extremely difficult and expensive thing to do.[6] If this is

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5   See "*Cracking Down on Copycats*", House of Representatives Standing Committee on Legal and Constitutional Affairs, November 2000.

6   See, for example, the section "*Evidentiary difficulties and burden of proof*" at 6.10ff from the Submission by the Motion Picture Association to the House of Representatives Copycats review.

such an intractable problem *even for the person who is the copyright holder and who has access to and control of all relevant records*, how can it possibly be reasonable to expect a person buying a copyright product to be able to assure themselves of copyright ownership? Usually the best they can do is to rely on markings present on the product.

8.3   Many of our members publish material sourced from thousands of different copyright owners. A substantial component of the business value provided by OSIA members to their customers is in aggregating, and integrating many different components. The Debian system referred to above includes over 8,000 different components.[7] For just one of those components, (the Linux kernel), there are over 500 copyright holders[8] (the Linux kernel probably has substantially more copyright holders than the average component). It is simply not feasible to conduct a rigorous check of copyright holdings for each component of a system.

8.4   Complexity itself is enough of a problem. However there are cases where it would be impossible, even with all the will in the world, to accurately establish copyright holding. For example, Symantec recently filed suit against Microsoft alleging, in part, that Microsoft is infringing copyright in Symantec's code.[9] If there is Symantec owned code within a Microsoft product then every person in Australia who sells that code will be committing a criminal offence, as may corporate IT staff who install the software on corporate computers. This will be so despite the fact that they were acting in good faith and in reliance on the licence provisions they have signed with Microsoft. While they may have valid licences with Microsoft, they will not have been properly licensed by Symantec. Moreover, there is no way they could reasonably have known that they were not properly licensed. The point of all this is that a copyright infringement by a supplier of copyrighted work necessarily causes all downstream acquirers of the work to also be infringing.

8.5   The copyright industry is extremely complex one. It is depressingly commonplace for copyright infringement actions to be taken out between existing market participants, including major players. Many actions are taken in respect of products which have already been published (since this is when the infringement comes to the notice of a potential plaintiff). Some of these actions are successful, others aren't. The ideology behind the strict liability provisions completely ignores the reality of the industry.

8.6   Defendants should be entitled to rely on indicia of copyright holding which appears on the product. If they reasonably believe that they have been licensed

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7   op cit at 13.

8   "*Linus's opinion, while vitally important, is not the last word. There are 500+ other copyright holders in the kernel.*" Wilson, A., "*Linux, Licensing, and Drivers -- an Overview*", Intel Open Source Technology Center (slide deck) available from: http://developer.osdl.org/dev/opendrivers/summit2006/andy_wilson.pdf

9   http://seattletimes.nwsource.com/html/businesstechnology/2003003687_websymantec18.html
     Text of complaint: http://seattletimes.nwsource.com/news/business/links/symantecsuit.pdf

by the copyright holder based on their reliance on those indicia they should not be exposed to criminal sanctions. Without this change the strict liability provisions are sure to make reasonable, good faith commercial activities illegal.

8.7   Given the inordinate complexity in tracking licensing it should be a defence against both the criminality provisions and infringements if the person follows an industry approved code of practice. This is particularly so in respect of the strict liability provisions.

9.   Interoperability with User Data – TPM Provisions

> *"[taking the (US) TPM provisions at face value] would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyright 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 [this] construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies - a practice that antitrust laws... normally prohibit."*[10]

9.1   The proposed interoperability exception takes as its basis a fundamental misunderstanding of how businesses operate. Our members don't have any great need to interoperate with existing programs in a user's organisation, they want to outsell their competitors and *replace* the existing programs with their own product line. Their goal is to ensure that none of their competitors' products remain within their customer's business. This goal necessarily means that there will be no "computer program" in respect of which an act will be taken.

9.2   What is important is accessibility to data created by a user in the course of using the program but left behind once such a program is removed. In short, word processing documents, spread sheets, databases, slide decks – the things businesses create every day in the ordinary course. It may also, in some circumstances, apply to data which is serialised in some other form – eg for transmission over a network.

9.3   As an aside, the provisions of section 47AB are of little comfort in this regard (*computer program includes any literary work that is: (a) incorporated in, or associated with, a computer program; and (b) essential to the effective operation of a function of that computer program*). It is difficult to see how these words would cover user data saved (or serialised) through the use of the program.

9.4   OSIA believes that the Bill will prohibit (or more correctly permit an incumbent vendor to prohibit) this legitimate practice. As no potential customer will adopt a new product if to do so means they must abandon their

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10 *The Chamberlain Group Inc v Skylink Technologies Inc* (Court of Appeals for the Federal Circuit)
     http://www.eff.org/legal/cases/Chamberlain_v_Skylink/20040831_Skylink_Federal_Circuit_Opinion.pdf at page 37.

existing data, this will effectively foreclose many markets to OSIA members.

Reasoning

9.5 If a software vendor is able to place an end user's data behind a TPM it will from there be a trivial exercise to commingle the vendor's own data with that of the customer. Indeed, this already happens in many situations today. For example, it is already a common enough practice to embed font files (owned by the vendor) in word processing and other documents. Once that material is commingled, the vendor will be able to sue competitors for any subsequent access to the data (since that access will also be to their copyright work – the font file). It would be an easy matter to craft a licence which ties access to the data to the use of vendor's products so the "permission" exception will not be available.

Proposal

9.6 We need an assurance that our members can legally sell a product which will provide access to a customer's data. The interoperability "between two programs" aspect is more likely to be a peripheral activity. The interoperability exception in its current form is unlikely to be of practical benefit to our members.

9.7 There should be an exception for the interoperability between programs and data as set out in Recommendation 15 of the report titled "Review of Technological Protection Measures Exceptions" tabled by the House of Representatives Standing Committee on Legal and Constitutional Affairs on 1 March 2006.

9.8 There should be a clear exception for the interoperability between a computer program and a person's data even if the act of saving that data has resulted in the commingling of third party data. It should not be a breach or an offence to supply a program to so access that data.

Comments on Previous Linkage to Section 47D

9.9 The interoperability exception was previously linked to 47D. Please do not consider a return to that linkage. Such a linkage is inadequate in that section 47D is predicated on the assumption that the act of access is not itself prohibited (as was the case when 47D was passed), but this is no longer true. The combined practical effect of linking this exception to section 47D would be that a person would be free to work out *how* to interoperate with a computer program, but would be prohibited from *actually doing* the interoperation. This is a substantive problem with section 47D which has remained static while the balance of the Act has moved on.

10. Access Control Technological Protection Measure

10.1 The concept of "access control technological protection measure" (ACTPM) is unclear in that it presumes that there is a single identifiable work and/or

copyright holder in respect of a work. In relation to many works this is simply not the case. A movie on a DVD may incorporate a sound recording copyright in which is held by a third party as part of the sound track for the movie. When that movie is put behind an access control protection measure who is the relevant copyright holder? Can any relevant person (eg the exclusive licensee in respect of Australia) apply the ACTPM against the wishes of other copyright holders (eg exclusive licensees of other jurisdictions)?

11. **Infringement Requirement**

11.1 The definitions of ACTPM and TPM should both, consistently with the reasoning of courts in the US and the High Court in Australia, contain a requirement that the measure prevents the infringement of copyright in the normal course of its operation. The absence of this requirement is a serious and substantial flaw in the Bill.

12. **Market Segmentation Qualification**

12.1 We see no reason in principle for the market segmentation qualification to be restricted to cinematograph films and computer programs. Such a scheme can be put in place in respect of any category of content or work.

12.2 We see no reason for excluding initial acquisitions as discussed in the Explanatory Memorandum.

12.3 We see no reason for the requirement that the relevant subject matter be acquired outside Australia. Would purchasing a DVD from Amazon.com be "acquired outside Australia"? Would a DVD acquired outside Australia, then sold on eBay within Australia be excluded?

13. **Permission Exception**

13.1 We cannot see how the permission exception will be of practical value. A person accessing a TPMed bundle has no actual knowledge of the contents of the bundle (and therefore who are the relevant copyright holders) until after that access has already occurred (how can they argue they have permission if they can't know who to acquire the permission from?).

13.2 Further, any particular data object will typically contain material from a multitude of copyright owners, few of whom will be disclosed or even discernible on the face of the data. For example, the number of distinct copyrighted elements incorporated into practically every modern film (ie all of the third party material for which copyright clearances must be sought) is enormous. Finally, the ACTPM definition is itself conditional upon the application with the permission of the copyright holder – a fact that no end user will be in any position to judge. In these circumstances no one could reasonably be expected to even be able to determine who permission should be sought from, let alone to have received it.

13.3 The permission exception can only be given meaning if it is drafted in the

negative. That is, that the person does not have reason to believe that the person does not have the permission of the relevant copyright holders.

13.4 In the alternative it should be a defence if the person relied on the permission of a person indicated as the relevant copyright owner on or associated with the copyrighted work or in accordance with any terms and conditions which accompany the work.

14. Provides v Distributes

14.1 The prohibition on distribution of circumvention devices seems extremely harsh. If an ISP is aware that program X is a circumvention device and an end user downloads a copy of program X then, by analogy with the transport company referred to in the Explanatory Memorandum, the ISP has "distributed" that program to that person despite the fact that it's knowledge of the distribution was purely nominal. There should be a connection between the knowledge requirement and the relevant act, not with knowledge about the device in the abstract.

15. Provisions May Prevent the Sale of DVD Players

15.1 The changes to the Act skirt around the fundamental concept of circumvention. Without an understanding of what comprises circumvention, it is difficult to understand what is prohibited by the Act. For example, if a DVD is encrypted with the CSS system (and assuming this is a TPM), when a DVD player plays the DVD, is that a "circumvention" of the CSS encoding of the DVD? Does the DVD player form part of the TPM?

15.2 If the player is not part of the TPM, then any DVD player provides access to the content protected by the TPM. Presumably this access will constitute "circumvention",[11] so not only its use, but its manufacture will be in breach. Moreover, there is no capacity in the Bill for a copyright owner to permit such a manufacture. All DVD players could be illegal.

15.3 If the player does form part of the TPM then this must be true of each DVD/player pair. How can an authorised player be distinguished from an unauthorised one in this situation?

Example

15.4 The CSS system mentioned above is available to the willing over the internet. If a person downloads and implements CSS in respect of their own content on their own DVD what is to stop them publishing a player for that content? Such a player will play their own content, but will also permit the playing of content encoded by anyone else who has encoded using CSS. Will this be a circumvention device? Will that person be able to notify the major electronics manufacturers to overcome the knowledge requirement, then take action (eg

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11 If it doesn't constitute circumvention, this seems to only be if the conditions of use (of the DVD) define what forms the TPM (ie use of an authorised player will not be circumvention implies that authorisation of the player conditions what forms the TPM) which seems to be inconsistent with the wording (device, product, technology or component).

under 116AO) since their players will be circumvention devices when considered against that person's DVD (as it is a work protected by the TPM)?

Thank you for the opportunity to make a submission to the Committee.

Yours faithfully,

[by email 30 October 2006]

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Open Source Industry Australia Limited