

# Final submission to the Productivity Commission's Inquiry into Intellectual Property Arrangements



Open Source Industry Australia Ltd

*Amplifying the voice of the Australian open source software industry*

Lodged 3 June 2016

## **About OSIA**

OSIA represents & promotes the Australian open source industry by:

- Ensuring that the Australian business, government and education sectors derive sustainable financial and competitive advantage through the adoption of open source and open standards;
- Helping Australian Governments to achieve world leadership in providing a policy framework supportive of open standards and of the growth and success of the Australian open source industry; and
- Ensuring Australia's global standing as the preferred location from which to procure open source services & products.

OSIA's members are organisations in Australia who invest in or build their future on the unique advantages of open source software. For further information, see the OSIA website at <http://osia.com.au>.

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# 1 Executive summary

OSIA welcomes the opportunity to comment again on the present Inquiry and we thank the Productivity Commission for that opportunity. The breadth and depth of the Commission’s interim report are substantial indeed and the Commission is to be congratulated on the high standard of its analysis and reasoning to date.

The various disparate fields of law that are grouped under the umbrella term “Intellectual Property” touch a vast array of industry sectors and fields of endeavour, growth in many of which is key to Australia’s economic success in the twenty-first century. The outcomes of this Inquiry will help shape not only the future of Australia’s high tech and other IP-intensive industries, but also what the future will look like for all Australians.

Whilst naturally OSIA’s chief interest is in the Australian computer software industry—the open source software (OSS) sector of which consists of our members—we appreciate the broader implications of the Inquiry and therefore in our submission we have endeavoured to address from our industry perspective many of the generic issues in addition to those that are specific to the Australian OSS sector.

## The Commission’s draft findings

OSIA endorses all three of the Commission’s draft findings in relation to copyright. The relentless, seldom justified, seemingly unbounded expansion of Australia’s copyright system has long been a concern to our members, including the pointless prohibition on circumvention of technological protection measures (TPMs) for purposes other than copyright infringement and the innovation-stifling double regulation of software by patents and copyright simultaneously. Likewise, the term for which copyright is granted today—life plus 70 years—is ludicrously in excess of the term over which any Australian business forecasts returns for investment selection purposes and therefore clearly unjustifiable. “Anti-piracy” measures are most efficient and effective when they focus on removing the impetus to infringe in the first place, rather than on detecting and litigating infringements after the fact.

We also endorse both of the Commission’s findings in relation to international treaties concerning IP. A firm, transparent negotiating platform, developed collaboratively with industry and the broader community, would help ensure that Australia only ever negotiates in good faith and for the benefit of Australians. The unnecessary focus on “harmonisation” of laws in international treaties on IP has clearly served to erode Australia’s sovereignty.

## The Commission’s draft recommendations

OSIA welcomes and supports all of the Commission’s draft recommendations on copyright, patents<sup>1</sup>, international co-operation, competition policy and dissemination of publicly funded works. In certain cases we have suggested a range of measures to enhance the efficacy of those draft recommendations, but in general we agree that the future directions for Australian IP policy proposed by the Commission will, if implemented expeditiously, result in substantial improvements over the status quo.

The original purpose of copyright and patents was to encourage the creation and maximise the dissemination of useful works and inventions. The act of optimising copyright and patent law is fundamentally one of balancing the public interest in the creation of more useful works & inventions (which some argue calls for more restrictive regimes) against the public interest in the maximising the dissemination of those works & inventions (which undoubtedly calls for more permissive regimes). Most of the reforms to copyright and patent law implemented in recent decades, both in Australia and abroad, appear to have lost sight of those lofty goals and instead focused on perpetuating existing advantages for a small cadre of entrenched interests and on propping up outdated business models, rather than embracing the far more widespread benefits enabled by genuine technological progress. It is heartening therefore to see in the Commission’s interim report analyses that are both firmly rooted in the fundamentals and coupled with a clear emphasis on maximising economic and scientific prosperity for Australia *as a whole*.

The Commission’s draft recommendations on geoblocking TPMs, parallel importation restrictions, fair use in copyright, the innovation patent system, business method & software patents and international co-operation, whilst they may in places differ in degree or in scope, are all in accord in principle with OSIA’s prior published recommendations on those matters. Similarly, the gist, if not always the exact detail, of the Commission’s draft recommendations on copyright in unpublished works, safe harbour, competition policy and publicly funded works are also in accord with OSIA’s positions on those matters.

In closing, OSIA commends the Commission’s draft recommendations, as modified slightly by our own recommendations, as a clear path towards a brighter, more prosperous and exciting future for Australia’s advanced industries and citizens alike.

## 1.1 Structure of this submission

The following section lists all of OSIA’s recommendations. In Section 2 on page 7 we address each of the Commission’s requests for further information in turn. In Section 3 on page 22, we comment on all but one (which was not seen as directly relevant to our sector) of the Commission’s draft findings. Finally, in Section 4 on page 25 we comment on a selection of the Commission’s draft recommendations which were viewed as most relevant to our membership.

<sup>1</sup>Other than the recommendations relating solely to pharmaceutical patents, on which we have no standing to comment.

## 1.2 Recommendations

### 1.2.1 Regarding the Productivity Commission's Draft Recommendations

1. Instead of implementing the Commission's Draft Recommendation 4.1, OSIA recommends the following stronger alternative approach:
  - (a) At the earliest possible opportunity, the term of copyright in unpublished works should be limited to 50 years from creation.
  - (b) Australia should take a leading role in opening negotiations for a revision (or successor) to TRIPS, with a view to setting the new globally agreed minimum copyright terms to 25 years from publication (for published works) and 8–10 years from creation (for unpublished works). If and when such a treaty can be negotiated, Australia should set its domestic copyright terms for new works to the new globally agreed minimum terms.
  - (c) Consideration should be given to the possibility of agreeing (in a global treaty) a maximum copyright term for unpublished works.
2. Instead of implementing the Commission's Draft Recommendation 5.1, OSIA recommends the following stronger alternative approach:
  - (a) All anti-TPM-circumvention provisions should be repealed from the *Copyright Act 1968 (Cth)*.
  - (b) The Commonwealth should refuse to be a party to any treaty that requires the act of TPM circumvention (as opposed to actual acts of copyright infringement) to be prohibited.
3. The Commonwealth should implement the Productivity Commission's Draft Recommendation 5.2 as is.
4. The Commonwealth should implement the Productivity Commission's Draft Recommendation 5.3. Ideally, the amendment should also grant the Minister responsible the discretion to declare additional fair uses.
5. The Commonwealth should implement the Productivity Commission's Draft Recommendation 7.1 as is.
6. The Commonwealth should implement the Productivity Commission's Draft Recommendation 8.1. The exception for software should be implemented as an exception for all copyrightable works.
7. The Commonwealth should implement the Productivity Commission's Draft Recommendation 14.1. Ideally, any formal guidelines for interpretation should be enshrined in a statutory instrument.
8. The Commonwealth should implement the Productivity Commission's Draft Recommendation 15.1. The proposed open access policy should require that publicly funded works either be placed in public domain or be released under free and open licence terms. The proposed open access policy should cover all publicly funded works (not solely those developed in the research community) of any class (not solely literary works).
9. The Commonwealth should implement the Productivity Commission's Draft Recommendation 17.1 as is.
10. The Commonwealth should implement the Productivity Commission's Draft Recommendation 18.1 as is.

### 1.2.2 Supplementary recommendations

1. Division 3 of Part III of the *Copyright Act 1967 (Cth)* should be amended to introduce a provision drafted along similar lines to s. 47H but with reference to the exception enshrined in s. 44E.
2. Standards Australia should establish a policy of rejecting any new standard that is patent-encumbered, without exception.
3. The Commonwealth Procurement Guidelines should be amended to provide that no computer software or any other technology that may benefit from interoperability may be procured by an agency unless it adheres to a relevant open standard, without exception.<sup>2</sup>
4. IP Australia and DIIS should make an in-principle public statement outlining their respective responsibilities for IP.
5. The Commonwealth should:
  - (a) Identify and eliminate all regulatory overlap;
  - (b) Co-ordinate IP policy development, regardless of whether or not IP regulation is to be centralised to a single agency;
  - (c) Implement mechanisms to resist regulatory capture; and
  - (d) Create an arms-length process for policy review and commentary, similar to the former Advisory Council on Intellectual Property.
6. The Commonwealth should ensure:
  - (a) There should be clear lines of responsibility for policy and administration *within* an agency;
  - (b) IP Australia or any other agency should not have quasi-judicial powers normally exercised by the courts; and
  - (c) Separate ownership of policy and administration.
7. The Commonwealth should implement Recommendations 4(b) & 4(c) from the Productivity Commission's 2010 report on bilateral & regional trade agreements.
8. Australia should never negotiate in secret, except for matters of defence and national security.
9. Australia should never ratify any treaty that was negotiated in a manner biased against the interests of Australian industry.
10. Australia should never negotiate in bad faith, nor even put in the place the machinery to enable doing so.
11. Australia should never agree to ISDS provisions in any treaty.
12. Australia should pursue further free trade agreements (whether bilateral, regional or global in scope), but only when they focus solely on free trade (to the exclusion of IP regulation and all other matters irrelevant to free trade).
13. Australia should only negotiate treaties on IP regulation, when they are of global or near-global scope (not bilateral or regional) and when they focus on IP alone (to the exclusion of all other matters).
14. A model agreement for IP regulation should cover the following principles:
  - Each treaty should focus on a single class of IP regulation (e.g. copyright alone or patents alone), to make the negotiation of further incremental improvements over time easier for all Parties.
  - Australia opposes any overlapping IP regulation. Each class of work, invention or other subject matter may be subject to a *maximum* of one form of IP regulation.
  - Australia must never grant retrospective IP rights.
  - Australia reserves the right to extend exemptions from IP regulation, for example extending the definition of fair dealing or providing access for disabled people to copyrighted material.
  - Australia reserves the right to take measures that improve the welfare of the Australian people, for example in the areas of health, environmental protection and consumer protection.
  - Where there might be sanctions for breaching an IP regulation, Australia reserves the right to define and vary those sanctions. For example, no foreign government or company may impose a "three strikes" policy on the Australian community.
  - Australia reserves the right to vary the length of time an IP regulation applies to a particular work or invention, so if we deem it appropriate we can reduce the period of time for patents and copyright.

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<sup>2</sup>For clarity: (a) where multiple relevant open standards exist, it should suffice to adhere to at least one of them; and (b) where no relevant open standard exists, the Commonwealth should either initiate itself, or fund private-sector initiation of the collaborative development of a suitable open standard, or join any such effort already underway overseas.

## 2 Requested further information

### 2.1 Copyright exceptions & licence conditions

#### INFORMATION REQUEST 5.1

*Other than for libraries and archives, to what extent are copyright licence conditions being used by rights holders to override the exceptions in the Copyright Act 1968 (Cth)? To what extent (if any) are these conditions being enforced and what are the resulting effects on users?*

*Would amendments to the Copyright Act 1968 (Cth) to preserve exceptions for digital material have any unintended impacts?*

#### 2.1.1 Attempts to override exceptions

We will confine our comments here to attempts to override those exceptions in the *Copyright Act 1968 (Cth)* which relate to computer programs, as computer programs are the class of work most often published by our members. Whilst some of our members also publish other classes of work, other organisations will no doubt be better placed than OSIA to consider the question in relation to those other classes of work.

Open source software licences, such as those under which many of our members distribute their software, do not attempt to override any of the exceptions in the Act, as the licensee's rights that are protected by those exceptions form a subset of the rights that must be granted to the licensee in order for a software licence to comply with the OSI Open Source Definition<sup>3</sup>.

Closed source software licences, on the other hand, frequently seek to override the Act's various exceptions.

**Licences considered** For the purposes of illustration, we examine the relevant terms of two common closed source software licences, one each from Microsoft and Adobe.

Microsoft Windows 10 has over 200 million users worldwide<sup>4</sup>. How many of those users are in Australia is not known, but it seems reasonable to assume that a significant number are. Microsoft licenses Windows 10 to its retail customers in Australia (and elsewhere) under the *Microsoft Software License Terms—Windows Operating System* (“MSLTWOS”)<sup>5</sup>.

The Adobe CS6 End User Licence Agreement (“CS6 EULA”)<sup>6</sup> is the licence under which Adobe distributes 23 of its software packages<sup>7</sup> to its retail customers in Australia (and elsewhere). Unlike Microsoft, Adobe does not publish its sales figures, but some of the software packages which they license under the CS6 EULA (e.g. Acrobat & Photoshop) are household names, so it seems reasonable to assume that they are in widespread use in Australia.

**Importation** Section 44E of the Act establishes an exception for importation of non-infringing copies of computer programs.

Both of the example licences considered attempt to override that exception<sup>8</sup>. The CS6 EULA goes even further, threatening licence termination not only for actual importation, but even for mere *suspected* importation<sup>9</sup>.

**Backup copies** Section 47C of the Act establishes an exception for creating backup copies of computer programs. That exception does not place any limit on the number of backup copies that can be made. In the field of commercial computing, it is considered best practice to maintain multiple backup copies of all data, including computer programs.

MSLTWOS only permits making “a single copy of the software for backup purposes”<sup>10</sup>.

**Bug fixes & security vulnerabilities** Section 47E of the Act establishes an exception for correcting errors (colloquially known as “fixing bugs”) in computer programs and Section 47F establishes an exception for testing the program's security and for investigating or correcting (colloquially known as “closing”) security vulnerabilities in the program.

In those two sections (cf. in Section 47C), “reproduction” includes decompilation & recompilation, by virtue of Subsection 21(5).

<sup>3</sup>Perens, B., *Open Source Definition*, Open Source Initiative, 1998. Available at <http://opensource.org/osd>

<sup>4</sup>Slater-Robins, M., *Here's why Windows 10's success is such a big deal*, Business Insider, 5 Jan 2016. Available at <http://www.businessinsider.com.au/windows-10-is-looking-like-a-huge-success-and-thats-a-big-deal-2016-1>

<sup>5</sup>Available at [https://www.microsoft.com/en-us/Useterms/Retail/Windows/10/UseTerms\\_Retail\\_Windows\\_10\\_English.htm](https://www.microsoft.com/en-us/Useterms/Retail/Windows/10/UseTerms_Retail_Windows_10_English.htm)

<sup>6</sup>Available at <http://www.images.adobe.com/content/dam/acom/en/legal/licenses-terms/pdf/CS6.pdf> — the English version is on pp. 96–111.

<sup>7</sup>As listed at <http://www.adobe.com/au/legal/licenses-terms.html>

<sup>8</sup>MSLTWOS, cl. 8.; CS6 EULA, cl. 2.1.1

<sup>9</sup>CS6 EULA, cl. 4.9.

<sup>10</sup>MSLTWOS, cl. 2.e.

MSLTWOS prohibits working around “any technical restrictions or limitations in the software”<sup>11</sup>. By any definition, both security vulnerabilities and other bugs would surely be regarded as “technical restrictions or limitations”.

CS6 EULA prohibits making any modifications to the software<sup>12</sup>. Whilst it may in some circumstances be possible to identify exhaustively a bug or a security vulnerability without modifying the software that contains it, clearly it is impossible to *correct* any such bug or vulnerability without modifying the software.

Thus, both example licences considered attempt to override Sections 47E & 47F.

### 2.1.2 Enforcement

The extent to which licence terms which seek to override the exceptions provided for in the Act are being enforced depends on one’s definition of “enforcement”.

**Judicial enforcement** Section 47H of the Act provides that:

An agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of subsection 47B(3), or section 47C, 47D, 47E or 47F, has no effect.

Clearly then, no competent Court would enforce licence terms that seek to override the exceptions in ss. 47C, 47E or 47F such as those identified in latter two examples above.

However, there is no equivalent voiding provision in the Act with respect to Section 44E. Therefore, it is at least possible that a closed source software vendor could use judicial process to enforce an overriding term such as that described in the first example above.

**Extra-judicial enforcement** Whilst s. 47H ensures that the Courts will not enforce provisions that seek to override the exceptions in ss. 47C, 47E & 47F, the majority of Australian businesses (and nearly all Australian consumers) are unlikely to be aware of the existence of s. 47H.

As a result there is nothing to stop a nefarious vendor from using mere *threats* of legal action (however hollow) as a de facto enforcement method.

OSIA is not aware of any specific case where that has happened, but we would not be at all surprised if it had.

**Effects on users** The effect on users of licence terms that override the exception in s. 44E is to enable vendors of closed source software to charge far higher prices for their software in Australia than in other jurisdictions. Not all closed source software vendors do so, but many do.

This has been well documented in the mainstream media to date. As Choice & News Limited pointed out in 2013, it can actually be cheaper to fly to the USA and back to buy Adobe or Microsoft software than to buy the exact same software here in Australia<sup>13</sup>. Parliament is aware of this problem, as reflected in the report of its 2013 inquiry into IT pricing<sup>14</sup>.

The effect on users of licence terms that attempt to override the exception in s. 47C is to create an unnecessarily inflated risk of business interruption for the end user organisation. Whilst most closed source software vendors will willingly provide replacement copies of lost, destroyed or defective media to customers who can prove that they are duly authorised licensees, OSIA is not aware of any closed source software vendor who willingly compensates such customers for lost productivity during the time from the request being made to the replacement media being delivered. The consequences of the risk could be mitigated substantially by the end user organisation keeping multiple backup copies (as permitted by the exception in s. 47C).

The effect on users of licence terms that attempt to override the exceptions in ss. 47E & 47F is to force users to accept sub-optimal software quality (both in terms of reliability and in terms of security).

One of the great strengths of open source software licences is that they always grant the user the right to modify, so the end user always has the option of fixing any discovered bugs and closing any discovered security vulnerabilities in the software themselves (or engaging any suitably competent firm to do so on their behalf, if they lack the in-house capabilities), even if the software’s authors show no interest in the bug or vulnerability report. When the authors do show an interest, this essential feature of open source software licences allows the user and the author both to work on the problem (in parallel, or even collaboratively), with the user contributing the fix upstream if he develops one first, which helps minimise time-to-repair and yields benefits for *all* users of the software.

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<sup>11</sup>MSLTWOS, cl. 2.c.(iv).

<sup>12</sup>CS6 EULA, cl. 4.3.

<sup>13</sup>*It is cheaper to fly to US than buy Adobe software in Australia*, News Limited, 13 February 2013. Available at <http://www.news.com.au/finance/business/it-is-cheaper-to-fly-to-us-than-buy-adobe-software-in-australia/story-fn5lic6c-1226576920561>

<sup>14</sup>House Standing Committee on Infrastructure & Communications, *At what cost? IT pricing and the Australia tax*, 29 July 2013. Available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_committees?url=ic/itpricing/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=ic/itpricing/report.htm)



It is much more difficult for end users to fix bugs or security vulnerabilities in closed source software (since they must first derive its source code by decompiling it, the result of which tends to be much more difficult to understand than the original source code), but it is not altogether impossible. The exceptions in ss. 47E & 47F appear to be designed for exactly that purpose. Licence terms that attempt to override those exceptions should be viewed as a serious threat to the integrity of computer systems across Australia.

### 2.1.3 Other methods of overriding exceptions

Whilst IR5.1 focusses on the use of licence terms to override the exceptions in the Act, it is worth noting that licence terms are not the only method used by some closed source software vendors to override those exceptions.

The use of “technological protection measures” (TPMs) to override those exceptions is widespread and has increased alarmingly since anti-TPM-circumvention provisions were introduced to the Act.

TPMs designed to override the exception in s. 44E include “geoblocking”, which we discuss in Section 4.2 of this submission.

TPMs designed to override the exception in s. 47C are generally known as “copy protection” (a bizarre term, since their purpose is to deny the right to make backup copies, rather than to protect it). A range of anti-modification TPMs also exist for the purpose of overriding the exceptions in ss. 47E & 47F. Both of those classes of TPMs have been around for a long time.

More recently, TPMs have been introduced to hardware devices that prevent modified versions of the software being run on those devices (thus rendering the exceptions in ss. 47E & 47F ineffectual). Microsoft’s “UEFI Secure Boot” initiative is an example of such a TPM. This class of TPM is even more iniquitous, because it also prevents users from running any software written independently by the user (or by anyone not explicitly authorised by the hardware vendor) on the device, even though that software is not a derivative work of anything written by the vendor, an outcome which is highly anti-competitive.

### 2.1.4 Impact of potential amendments

The impact of any potential amendment to the Act would naturally depend on how the amendment is to be drafted.

The existing Section 47H provides a good model. A new section should be drafted along the same lines and introduced to Division 3 of Part III with respect to the exception enshrined in Section 44E, as the absence of such a section at present constitutes a de facto parallel importation restriction. In OSIA’s view, all parallel importation restrictions (regardless of whether enacted explicitly or by omission) serve no useful purpose in Australia and give rise to substantial costs for Australian businesses and consumers. OSIA foresees no unintended effects of an amendment drafted along those lines.

Whilst OSIA’s main concern is computer software, we would also support the introduction provisions similar to s. 47H in relation to digital works other than software.

#### Recommendation

- Division 3 of Part III of the *Copyright Act 1967 (Cth)* should be amended to introduce a provision drafted along similar lines to s. 47H but with reference to the exception enshrined in s. 44E.

## 2.2 Copyright collecting societies

### INFORMATION REQUEST 5.2

*Is the code of conduct for copyright collecting societies sufficient to ensure they operate transparently, efficiently and at best practice?*

Although it is at least theoretically possible to operate a copyright collecting society for computer software, OSIA is not aware of any such organisation being formed to date, in Australia or abroad.

Given that computer software is the predominant class of work published by our members and no copyright collecting societies exist today for that class of work, other organisations will no doubt be better placed than OSIA to consider the question in IR5.2.

## 2.3 Statutory copyright licences

### INFORMATION REQUEST 5.3

*Will the Australian Government's proposed reforms to simplify and streamline education statutory licences result in an efficient and effective scheme? Should similar reforms be made to the operation of the government statutory licence scheme?*

Part VA of the Act covers broadcast material. As none of our members are broadcasters and none of the works published by our members are intended for broadcast, OSIA is not qualified to answer this question in relation to Part VA.

Neither Part VB nor Division 2 of Part VII apply to computer programs, by virtue of ss. 135ZE & 182B(2) respectively. To the best of our understanding, the reforms proposed by the Australian Law Reform Commission do not include extending the application of those Parts to cover computer software.

Therefore, given that computer software is the predominant class of work published by our members, other organisations will no doubt be better placed than OSIA to consider the questions in IR5.3.

Naturally, if any future reforms are proposed to extend the application of those Parts to cover computer software, OSIA will review them on their merits at that point. Having said that, OSIA sees no compelling reason to establish any statutory licensing schemes for computer software.

## 2.4 Patent filing process reform

### INFORMATION REQUEST 6.1

*The Commission is seeking further information from participants on the likely costs and benefits from reforming the patent filing processes. Would there be any unintended consequences from requiring applicants to construct their claims in the two-part form that applies in Europe or articulating why their invention is non-obvious? Are there better approaches available?*

OSIA's principal position on patents, as articulated in many of our submissions over the years, is that they ought not to apply *at all* to computer software (the main field of endeavour in which our members innovate). We discuss the scope of patentable subject matter in Section 2.6.

Nevertheless, we have elected to respond to all of the Commission's Information Requests on patents on the basis that, given our industry sector's experiences with patents to date, our views on broader patent reform may be relevant to some other fields of endeavour. Furthermore, in the most unfortunate event that Draft Recommendation 8.1 is not implemented (or is not implemented in a timely manner), our members will continue to have an interest in broader patent reform.

The two reforms discussed in the Commission's interim report—requiring each claim to be submitted in the two-part form; and requiring applicants to define the inventive step explicitly in the application—appear eminently sensible. OSIA supports both of those reforms.

The concern raised that requiring detailed information on the prior art to be included for each claim may be an unreasonable burden on applicants is not warranted. The Commission's statement that "Not all applicants will have a detailed knowledge of the prior art" may well be true, but it rather misses the point. If an applicant does not have a detailed knowledge of the prior art, why is that applicant even considering applying for a patent in that field? If anything, this reform is likely to reduce (although to what extent is not clear) the volume of low quality patents lodged "on the off-chance" that they might survive examination. That would in turn reduce the workload for IP Australia, thus expediting the examination process for the higher quality patent applications that remain.

On the other hand, the concern raised about "benchmarking bias" may well be warranted. That unintended consequence could best be minimised by ensuring that patents are examined only by examiners having substantial and recent engineering experience in the field of endeavour to which the claims relate. In other words, the ideal examiner is one who is as close as possible to being the hypothetical "person skilled in the art".

Clearly, recruiting senior engineers from industrial R&D facilities as patent examiners on temporary fixed-term contracts would be a costly exercise. Those costs however need not be borne by the taxpayer: this would seem to be a textbook case for employing a fee-for-service funding model. The resultant increase in the cost of prosecuting a patent would merely serve once again to encourage a reduction in the volume of low quality patent applications.

## 2.5 Patent infringement exemption for experimental activities

### INFORMATION REQUEST 6.2

*The Commission is seeking information from participants on the costs and benefits of the exemption from infringement for experimental activities that use a patented invention. Are there any examples in Australia where the efforts of researchers have been hindered by the lack of such an exemption?*

OSIA is not aware of any specific case in which the narrow nature of the new experimental use exemption has hampered industrial research undertaken by any of our members.

However, much research in computing—at least in Australia—tends to be undertaken at any of Australia’s fine universities or other research institutions, rather than within industry.

Whilst OSIA does not see in industry any pressing need for a broadening of the experimental use exemption, we also see no unintended consequences of such broadening.

Accordingly, we defer to the comments made by the University of Sydney (and others in the academic sector) on this question.

It should be noted however that—at least within the field of computer software—the question of the scope of the experimental use exemption would be rendered moot by the exclusion of all computer software from the scope of patentable subject matter, as recommended by OSIA on multiple occasions, and most recently by the Commission itself.

## 2.6 Patentability of embedded software

### INFORMATION REQUEST 8.1

*What approaches or tests could be used to differentiate between inventions where the contribution of embedded software is trivial and inventions where the contribution of embedded software is genuinely deserving of patent protection? Should such tests be implemented in law or patent examination practices?*

OSIA’s position is that no software (embedded or otherwise) ought to be considered patentable subject matter. Nevertheless, we address here the Commission’s questions of classification, principally in order to demonstrate that such classification is not a solvable problem.

### 2.6.1 Embedded & non-embedded software

Before any meaningful distinctions can be made between different categories of embedded software, one must first have a method of determining whether any given software program is “embedded” or not (otherwise the question becomes even more complex).

#### Why traditional definitions do not work

A number of informal definitions of “embedded software” exist, none of which are sufficient for the task at hand:

- *Programs stored in firmware.* This definition is not at all useful in the present context. A program’s algorithms remain the same, regardless of whether stored on disc, on tape, in main memory, in non-volatile memory, or in read-only memory (ROM). It makes no sense at all to define the patentability of a program on the basis of the medium on which it is stored. Such an approach would no doubt only result in those seeking to patent software fabricating ROMs that contain the code before applying for a patent.
- *Algorithms implemented in hardware.* This definition is a minor variation on the previous theme. It is possible to implement *any* computer program in an application specific integrated circuit (ASIC), but again that approach would boil down to assessing the patentability of a program on the basis of the medium on which it is stored, which makes no sense. Both of these definitions rely on characteristics of the *embodiment*, rather than the idea itself, so are fundamentally incompatible with patent law (cf. copyright).
- *Programs which do not require an operating system.* This definition is perhaps the most bizarre of all, since under it general-purpose operating systems themselves would all be regarded as “embedded”. Further, it is possible (although rarely done today) to implement any program without it requiring an operating system. In these days of virtualisation, hypervisors and unikernels, it is no longer clear where an operating system begins and ends.
- *Programs designed to be run on specific hardware.* This is perhaps a little closer to the mark, but still far too broad to be of any use, since all non-portable software falls into this category (and it is trivial to take any program and make it non-portable).
- *Programs used to control industrial processes.* This might have been true some decades ago, but today many such process control programs are implemented using general-purpose computers with general-purpose operating systems, in a manner that nobody would regard as “embedded”.
- *Programs that run on real-time operating systems (RTOSs).* This definition ignores that fact that many RTOSs exist for non-embedded purposes. Furthermore, it is possible to implement any program so that it can run on an RTOS.

- *Programs that do not have a user interface (UI)*. This definition ignores a vast array of non-embedded software, including all server software.

### Towards a working definition?

From first principles, it is probably easiest to begin by defining a broad class of software that is *not* embedded. To that end, OSIA offers the following definition:

Any program which is designed or intended to be executed on a general purpose computer<sup>15</sup> is not embedded software.

For the present purpose, that is necessarily the *narrowest* sufficient definition of non-embedded software, since by the Church-Turing thesis we know that any Turing-complete instruction set can be used to simulate any other Turing-complete instruction set—and it would make no sense at all for the patentability of an algorithm to be dependent on the choice of instruction set in which its first embodiment is implemented.

Despite that definition being the narrowest sufficient definition of non-embedded software, it is nevertheless exceedingly broad—under it, the vast majority of software ever written is not embedded.

### 2.6.2 The balance of triviality

For anyone skilled in both computer programming and electronic engineering, it is quite straightforward to re-implement any software embedded in a hybrid hardware-software system in hardware, or vice-versa.

It is possible to reduce the contribution of embedded software in any such system to “trivial”, merely at the cost of more complex (and therefore more expensive) hardware. This follows from the facts that: (a) it is possible to solve any computable problem with a Turing-complete instruction set; and (b) it is possible to implement a processor with a Turing-complete instruction set using only standard electronic components.

Since patents exist to protect *ideas*, not their specific embodiments, it does not make sense to assess patentability on the basis of the manner in which the idea is embodied.

As a result, the distinction “where the contribution of embedded software is trivial” is effectively meaningless. The relative contributions of embedded software and equivalent implementation in hardware could be adjusted in any hybrid system, in order to render the embedded software either “trivial” or “non-trivial”. A triviality test is likely to provide a loophole that will enable an end-run around the proposed general exception for software. If there was a specific counter-exception for “non-trivial embedded software”, it could be used to add noise and complication to a patent application where the hardware component is not deserving of a patent.

The choice of whether to implement a program directly in hardware or to implement it in embedded software is usually one that a manufacturer decides on the basis of trade-offs between cost and performance. Note that this decision is traditionally made during production planning, and again relates only to the specific embodiment.

Because the very definition of “embedded” software is problematic, we oppose making a special case of embedded software. The distinction between trivial and non-trivial software is fraught with difficulty. Therefore, it is pointless—perhaps even futile—to attempt to make that distinction. We recommend that IP Australia and other regulators avoid entering that mire in the first place.

### 2.6.3 Legislative & administrative regulation

As discussed above, the distinction between trivial and non-trivial contributions of embedded software is not meaningful, so should not be used as a criterion for patentability.

However, if a suitable alternative criterion is agreed upon, OSIA would prefer to see it implemented by an amendment to the *Patents Act 1990 (Cth)*, rather than as a mere change to administrative procedures at IP Australia. Statutory exceptions provide far greater certainty to all stakeholders.

### 2.6.4 An alternative approach

OSIA supports the Commission’s view that computer software should not be patentable. We see no value in a “triviality of contribution” test, for the reasons described above.

However, such a test is not necessary in order to decide what parts of a hybrid hardware-software system may be patentable and such a test is entirely superfluous to providing an exception to patentability for “pure” software.

As we have mentioned previously, software is unique in that it is the only class of work subject at present both to copyright and to patents. Whilst that state of affairs is undesirable, in the light of the present question it can also be put to good use.

<sup>15</sup>In the field of computing, the term “general purpose computer” means any computer which has a Turing-complete instruction set (i.e. one which is capable of executing an algorithm to solve any computable problem).

There exists a comprehensive body of law for determining what is or is not subject to copyright. Since there is no possible public policy purpose in subjecting any class of work *both* to copyright and to patent law, why not use that existing body of copyright law to define the scope of the exclusion from patentable subject matter?

### Recommendation

- The *Patents Act 1990 (Cth)* should be amended to provide that no copyrightable work may be patented.

Where a genuine invention utilises some embedded software (or any other copyrightable work), an exception such as that proposed should not by itself prevent the invention from being patented. Rather, it should only ensure that: (a) the decision on whether or not to grant a patent is made without any reference to the embedded software; and (b) if the patent is granted, it is enforceable only with respect to the remainder of the invention (and not to any embedded software).

## 2.7 Pay-for-delay settlements

### INFORMATION REQUEST 9.1

*How can transparency requirements for pay-for-delay settlements be implemented in a manner that retains effectiveness but minimises compliance cost?*

- *Should there be public reporting of aggregated data?*
- *How can the system adequately capture agreements that involve the transfer of non-monetary benefits such as licences or transfer of rights?*

To the best of OSIA's knowledge, pay-for-delay settlements are not used at all in the computer software industry, not even by those closed source software vendors who pursue aggressive software patent strategies.

Therefore OSIA is not in a position to comment authoritatively on the risks posed by pay-for-delay settlements or on the best policy approach to avoiding or mitigating those risks.

It occurs to us however that pay-for-delay settlements attempt to extend the monopoly granted by patents beyond their expiry in much the same manner as TPMs effectively extend the monopoly granted by copyright beyond its expiry.

In OSIA's view, arrangements which permit anti-competitive measures to persist beyond the expiry of the primary IP right can never be in the public interest. This is of course why the monopolies granted by copyright and patents were time-limited in the first place.

## 2.8 Trade marks & metadata

### INFORMATION REQUEST 11.1

*To what extent — in terms of incidence and costs — is trade marked metadata used in a way to confuse consumers? Is such a problem likely to get worse or better?*

### 2.8.1 Trade marks in web site metadata

OSIA does not see any inconsistency in the judicial decisions in Australia to date on use of trade marks in metadata. The key question is whether the mark is used *as a trade mark*. In the only case where the Courts found the use of a mark in metadata to be infringing<sup>16</sup>, the facts were quite different from the other cases on metadata: the use was clearly as a trade mark.

From the *Lift Shop* case<sup>17</sup>, it is clear that there is indeed a risk to holders of “weak” trade marks, such as those comprised of generic English descriptions, that they may lose some market share as a result of the use of those marks by their competitors in web site metadata. However, it should be noted that that risk is no greater than the risk that has always been faced in the offline marketplace by those who choose to register such generic terms as marks. This is not a new threat imposed by digital technology; it is merely an example of the online marketplace mirroring the offline.

OSIA supports a strong trade mark regime, but not one so restrictive as to forbid all use of plain English words which happen to have been registered as trade marks. Such usage, in the context of web site metadata, has little to no potential to confuse consumers. In our opinion the use *as a trade mark* test is an appropriate one.

The problem—if indeed there was one to begin with—has already abated substantially and will continue to do so. A decade ago, the practice of generating rankings principally on the basis of web site metadata was common amongst search engine operators. That is no longer the case. The major search engine operators today are using far more sophisticated ranking algorithms.

<sup>16</sup>*Accor Australia & New Zealand Hospitality Pty Ltd v. Liv Pty Ltd* [2015] FCA 554.

<sup>17</sup>*Lift Shop Pty Ltd v. Easy Living Home Elevators Pty Ltd* [2014] FCAFC 75.

### 2.8.2 Trade mark use for targeting online advertisements

On the other hand, the market for targeted online advertising is booming. Today, advertisers are far more likely to use competitors' trade marks as selection keywords in their search engine advertising campaigns<sup>18</sup> than to attempt organic search engine optimisation (SEO) by embedding those marks in metadata on their web sites.

Such usage is likely to become more widespread over time. However, OSIA does not see that as a problem at all, as in such cases the use of the mark is merely in an instruction issued by the advertiser to the search engine operator as to which result sets (based on search query terms) the advertiser is prepared to pay for its advertisement to appear alongside. Conceptually, this is no different from a traditional sales manager in a bricks-and-mortar company instructing representatives to target customers of one of the company's competitors.

Clearly, it is a matter of context and the law on the relationship between trademark infringement and the context of use was laid out clearly in the decision in the "oil drop man" case, more than half a century ago<sup>19</sup>.

## 2.9 Geographical indications

### INFORMATION REQUEST 11.2

*To what extent and in what form does consumer confusion arise from the provision of wine and spirit geographical indications?*

*Under what circumstances should wine and spirit geographical indications be amended or repealed? Who should make such decisions?*

### 2.9.1 Potential for confusion under the status quo

None of OSIA's members produce wine or spirits, so we are not in a position to comment on the first question from a supply-side perspective. Nevertheless, many of our members, like many other businesses and individuals in Australia, are consumers in that market so it is in that capacity that we comment here.

The comments made by the Australian Grape and Wine Authority (AGWA) were indeed surprising to us. We suspect that most Australians are not aware of the rules governing the use of multiple concentric GIs in labelling and we agree with the Commission and with AGWA that those rules are likely to cause consumer confusion.

### 2.9.2 Scope for broader reform

It is not clear to us whether the Commission's question about the potential amendment or repeal of GIs refers to existing specific instances of GIs or to the existing sui generis regime itself. OSIA is not qualified to comment on the former, so we confine our comments here to the latter.

It is relatively common for software development companies to represent themselves as being "Australian", despite only having a skeleton staff (often only a sales department) in Australia, with the vast majority of their development work being conducted off-shore. This occurs because: (a) Australia's computer software industry in general (and the Australian open source software sector in particular) has a good reputation for quality; and (b) the cost of hiring experienced programmers is relatively high in Australia, as in most other developed countries.

OSIA sees substantial scope for arrangements of the type described to mislead clients in the Australian software development market, to the detriment of those of our members who maintain a staff of high quality programmers wholly or substantially within Australia.

OSIA has previously supported<sup>20</sup> and we continue to support any move to extend the existing sui generis regime for GIs so that it would apply to *all* goods *and* services, rather than solely to wine and spirits. In our view, there can be no legitimate reason for misleading a client as to region of origin, regardless of the nature of the good or service being sold.

It should be noted that whilst, in the context of the software industry, the very broad "Australia" would be the GI of most concern to us, there also exist specific regions that may well be worthy of GI protection in service industries such as ours. "Canberra", for example, is well known to be the home of some of the world's leading developers of open source software.

<sup>18</sup> As were the facts in *Veda Advantage Limited v. Malouf Group Enterprises Pty Limited* [2016] FCA 255

<sup>19</sup> *Shell Company of Australia Ltd v. Esso Standard Oil (Australia) Ltd* [1963] HCA 66; (1963) 109 CLR 407.

<sup>20</sup> Burton, J., Holden, C. & Christie, D., *Submission to the Department of Foreign Affairs & Trade on the Trans-Pacific Partnership*, Open Source Industry Australia, 2013, p. 11. Available at [http://www.osia.com.au/drupal7/sites/default/files/default/osia\\_trans\\_pacific\\_partnership\\_submission\\_0.pdf](http://www.osia.com.au/drupal7/sites/default/files/default/osia_trans_pacific_partnership_submission_0.pdf)

## 2.10 Plant breeders' rights

### INFORMATION REQUEST 12.1

*Would extending essentially derived variety coverage to all plants reduce the potential for patent 'sniping' of varieties protected by Plant Breeders' Rights?*

*The Commission is also seeking feedback on the practicalities of developing and implementing a market-impact test to complement existing tests of essentially derived variety status.*

Since none of our members engage in commercial plant breeding, OSIA is not qualified to answer the questions posed in IR12.1.

## 2.11 Circuit layout rights

### INFORMATION REQUEST 13.1

*What would be the implications of repealing the Circuit Layouts Act 1989 (Cth)? Are there better ways to provide circuit layout rights?*

Only one of OSIA's members develops electronic devices eligible for circuit layout rights. Given such a small sample size, OSIA is not in a position to comment on the practical economic implications of repealing the *Circuit Layout Act 1989 (Cth)*.

From a theoretical perspective however we note that the *logic* design for all such devices (as usually expressed in a hardware definition language, such as VHDL or Verilog) is subject to copyright, not to circuit layout rights (CLRs) and it is trivial for any authorised licensee<sup>21</sup> of the hardware definition source to generate a unique circuit layout from that source, simply by running it through their preferred circuit layout synthesis software using a different random number seed to that used by the original circuit designer.

Whilst it is true that some specific layouts of the same logic design can possess certain beneficial operating characteristics (e.g. reduced cooling requirements), the sheer number of combinations of potential layouts that exist for any logic design sufficiently complex to require very large scale integration (VLSI) suggest that it would be rare indeed for any *single* circuit layout to be substantially preferable to *all* others.

Therefore, it is difficult to see what benefit CLRs could provide over copyright, other than the more reasonable term (10 to 20 years, cf. 50 years to life + 70 years for copyright).

## 2.12 Grant-back obligations & economic hold-up

### INFORMATION REQUEST 14.1

*Is there any evidence that grant-back obligations or economic hold-up are widespread problems in Australia? Is there a risk of these becoming problems in the future?*

### 2.12.1 Grant-back obligations

#### Grant-back obligations in free & open source software licences

Generally speaking, free & open source software (FOSS) licences can be divided into two broad categories: *permissive* FOSS licences (such as the two-clause BSD<sup>22</sup>, ISC<sup>23</sup> & MIT<sup>24</sup> licences); and *copyleft* FOSS licences (such as the GPL<sup>25</sup>, AGPL<sup>26</sup> & MPL<sup>27</sup>).

**Permissive FOSS licences** impose very few obligations on the licensee, beyond a strong requirement for attribution. By definition, grant-back obligations never appear in this class of licence.

**Copyleft FOSS licences** by contrast, *always* contain grant-back obligations. This class of licence is designed to ensure that the four essential freedoms<sup>28</sup> guaranteed to original licensees are also guaranteed to subsequent downstream licensees (including licensees of any derivative works).

Because of the specific way in which copyleft licences make use of grant-back obligations (to benefit *all* users of the software, rather than merely its original author), those obligations cannot give rise to anti-competitive effects. On the contrary,

<sup>21</sup>Whilst it is relatively rare for the logic designs of non-trivial integrated circuits to be licensed broadly, some prominent exceptions do exist. For example, in 2006 & 2008, Sun Microsystems released the complete design of the UltraSPARC T1 & T2 processors under the GNU General Public Licence (GPL).

<sup>22</sup><https://opensource.org/licenses/BSD-2-Clause>

<sup>23</sup><https://opensource.org/licenses/ISC>

<sup>24</sup><https://opensource.org/licenses/MIT>

<sup>25</sup><http://www.gnu.org/licenses/gpl.html>

<sup>26</sup><http://www.gnu.org/licenses/agpl.html>

<sup>27</sup><https://www.mozilla.org/en-US/MPL/2.0/>

<sup>28</sup>Stallman, R., *What is Free Software?*, Free Software Foundation. Available at <http://www.gnu.org/philosophy/free-sw.en.html>



they serve to *foster* broader competition, both in the market for derivative works and in the market for third-party support & maintenance.

### **Grant-back obligations in closed source software licences**

Most contemporary closed source software licences (including the two examples considered in Section 2.1.1 on page 7) do not permit licensees to make modifications at all, so the question of grant-back obligations is unlikely to arise in those cases.

However, some closed source software licences do permit modification explicitly and of course ss. 47E & 47F of the *Copyright Act 1968 (Cth)*—when read in conjunction with s. 47H—set out some limited circumstances in which modification is permitted regardless of explicit licence terms.

It should also be noted that most closed source software licences do not permit redistribution by licensees, so for those the question of grant-back obligations does not arise. But again, some—most notably many closed source licences for software libraries designed to be embedded in otherwise original software developed independently by licensees—do permit redistribution.

Where a closed source software licence explicitly permits redistribution *and* modification is permitted either expressly or by virtue of the exceptions enshrined in the Act *and* the licence contains grant-back obligations (which admittedly is a small, but nevertheless non-empty, subset of all closed source software), those grant-back obligations do indeed give rise to anti-competitive effects.

For that reason, amongst others, many downstream software developers (those who develop derivative works of existing software) today choose to work with software that is distributed under FOSS licences, whenever that possibility exists.

In domains where that option does not exist (which are becoming increasingly rare, but have not yet completely disappeared), the anti-competitive effects of grant-back obligations in closed source software licences are indeed a problem for downstream software developers.

That problem is far less widespread than it used to be and will continue to diminish as FOSS alternatives continue to be released in more and more specialised domains.

There is however a risk that that problem may return, if the Commonwealth Government elects to pursue policy options that are hostile to the Australian open source software industry, such as ratifying the Trans Pacific Partnership (TPP).

### **2.12.2 Economic hold-up**

Like all other forms of vendor lock-in tactics, “hold-up” is clearly anti-competitive. The use of such tactics in relation to patents on ideas that have been contributed to standards is of even greater concern.

The issue of hold-up is most relevant to patents. Whilst there have been isolated cases in the past of closed source software vendors attempting to use a similar tactic in relation to the pricing of subscription-based (as opposed to permanent) copyright licences, the scope for abuse is far less in copyright than it is in patent. The reason for that is simple: since copyright applies to the specific embodiment (cf. the generic idea, as is the case with patents), copyright licensees always have the option of developing (or engaging any suitably competent software house to develop) a wholly independent (“clean room”) implementation from scratch. As the extent of hold-up tactics increases, eventually there comes a point at which the cost of developing an independent implementation is similar to (or perhaps even less than) the cost of continuing to accept vendor lock-in. As that point is approached, a sensible licensee will opt for independent development. It only takes one such licensee to do so and to release their implementation under more reasonable (ideally open source) licence terms for the efficacy of the hold-up tactic to be overcome. With patents, on the other hand, the licensee does not have that option.

With respect to software, the best solution of course is to remove software from the scope of patentable subject matter altogether.

For patents on anything other than software, where the subject matter is worthy of patent protection, subtler approaches will no doubt be required. OSIA sees two ways in which economic hold-up can be avoided in such cases:

Firstly, it is important to ensure that there is sufficient certainty in the terms of patent licences. That, however, is not a matter for the Commonwealth Government to dictate. Rather, it is a matter for the parties themselves to negotiate. Much as, for example, when negotiating a long-term commercial lease, a sensible lessee will only agree to subsequent year price increases that are either set in stone at the outset or tied to some neutral measure beyond the direct control of the lessor (e.g. indexed to the CPI), so too a sensible patent licensee ought to take similar precautions. The role of Government in such things comes into play only when one of the parties to the transaction is in a position to abuse overwhelming market power, for example when the licensor has established a substantial patent thicket around which it is impossible to innovate. The existing provisions of the *Competition and Consumer Act 2010 (Cth)* are likely to suffice in such circumstances, if s. 51(3) is repealed, as per the Commission’s draft recommendation.

Secondly, it is important to ensure that standards are not encumbered by patents in the first place. The purpose of a standard is to promote broad use, whereas the effect of a patent is to restrict broad use in the short term whilst facilitating it in the long term. Therefore it should be clear that patents and standards are fundamentally incompatible. Whilst standards in general are beyond the control of the Commonwealth Government, it does have something of a role to play with respect to



those international standards bodies in which Standards Australia participates and in that role it makes sense for Australia to do what it can to limit the incidence of new standards being encumbered by patents.

The Commonwealth Government also has a role to play, by way of its procurement processes, in helping to slow and ultimately halt the proliferation of existing patent-encumbered standards. OSIA has long argued that the Commonwealth should only procure software (and a similar argument applies with respect to any other technology that may benefit from interoperability) that adheres to open standards (which by definition are not patent-encumbered). Such a policy would help address the problem, since strong public procurement policies of that ilk tend to be interpreted as signals likely to be followed by the private sector market in due course. Even a substantially weaker policy of continuing to accept closed standards but only when they are not patent-encumbered, would be effective in addressing the problem at hand (although such a policy would not address the other deficiencies of closed standards).

### Recommendations

- Standards Australia should establish a policy of rejecting any new standard that is patent-encumbered, without exception.
- The Commonwealth Procurement Guidelines should be amended to provide that no computer software or any other technology that may benefit from interoperability may be procured by an agency unless it adheres to a relevant open standard, without exception.<sup>29</sup>

## 2.13 Institutional & governance settings

### INFORMATION REQUEST 16.1

*What institutional and governance settings would best ensure that IP policy benefits from a policy champion and is guided by an overarching policy objective and an economywide perspective?*

*Would vesting IP policy responsibility in a single department further these goals, and if so, which department would be best placed to balance the interests of rights holders and users, including follow-on innovators?*

*Are there any complementary or alternative measures that would help facilitate more integrated and evidence-based IP policy-making?*

### 2.13.1 Institutional and governance settings

OSIA agrees that the Australian government should clearly define IP policy objectives, and this has been inconsistent in the past.

Overlapping regulation is hostile to innovation<sup>30</sup>. Software is by far the most economically significant IP that can be subject to both patent and copyright. Virtually all innovative software incorporates or depends on other pre-existing software (libraries, frameworks, platforms, operating systems and so on). Thus any IP restrictions on the use of pre-existing software make it harder to innovate at all.

Regulations should be focussed and simple. Innovators should be able to understand their obligations with a minimum of effort.

Fragmented IP regulation increases the risk of regulatory capture, where an agency largely benefits a small number of specialists and very large multinational companies to the detriment of the Australian public and smaller Australian businesses.

We wholeheartedly agree with Dr Terry Cutler's statement that "it is imperative that IP policy make the transition . . . from a specialist policy area dominated by lawyers, to an important front of micro-economic reform".<sup>31</sup>

An excellent first step would be an in-principle public statement by IP Australia and DIIS outlining their respective responsibilities for IP. That needs no legislation; it is simply a matter of good governance.

<sup>29</sup>For clarity: (a) where multiple relevant open standards exist, it should suffice to adhere to at least one of them; and (b) where no relevant open standard exists, the Commonwealth should either initiate itself, or fund private-sector initiation of the collaborative development of a suitable open standard, or join any such effort already underway overseas.

<sup>30</sup>See Section 2.6.4 on page 12.

<sup>31</sup>Cutler, T., *Venturous Australia, building strength in innovation: Review of the National Innovation System*, Cutler and Company, 2008, p. 85.

**Recommendation**

- IP Australia and DIIS should make an in-principle public statement outlining their respective responsibilities for IP.

**2.13.2 Vesting in a single department**

Creating or merging agencies and functions will not in itself solve anything. Institutions are a means to the end of good policy and good regulation. At present, we have separate institutions. It would take time to merge their functions and that could turn out badly. In the shorter term, we think it is urgent:

- to eliminate overlap—the prime example of this is that both patents and copyright apply to software;
- to define clearly and publicly where each agency’s responsibilities start and stop;
- to co-ordinate policy development; and
- to ensure that the benefit of the Australian community outweighs the interests of a few, including consultation with all stakeholders.

All these *might* be enabled by a single agency, but we can and should make a start without one.

**Recommendations**

- Identify and eliminate all regulatory overlap.
- Co-ordinate IP policy development, regardless of whether or not IP regulation is to be centralised to a single agency.
- Implement mechanisms to resist regulatory capture.

**2.13.3 Complementary or alternative measures**

Any proposed extension to IP regulation should carefully consider impacts. It should be tested against goals and there should be demonstrable benefits to the Australian community.

Re-establishing an independent body something like the former Advisory Council on Intellectual Property (ACIP) would provide a good way to help ensure that the perspective of the public is not ignored.

**Recommendation**

- Create an arms-length process for policy review and commentary, similar to the former Advisory Council on Intellectual Property.

**2.14 Separation of policy & administration****INFORMATION REQUEST 16.2**

*Is there merit in establishing a clearer separation between policy and administrative functions for intellectual property, and if so, where should the dividing line lie?*

*What mechanisms are available for transparently setting out the separation of IP policy and administration responsibilities?*

**2.14.1 Separation between policy and administrative functions**

OSIA has consistently opposed regulation in a vacuum, that does not take account of impacts and benefits. Policy in a vacuum is just as bad; policy must inform practice. If all IP policy and regulation is combined into the one agency, as mooted in section 16.1, we oppose carving up these functions again into two separate agencies, even if the division is on clearer lines. No agency should have a goal of merely delivering regulation—rather, it should provide higher level benefits for Australia.

The risks of blurring policy and administration do not automatically disappear if the two are more formally separated. Although separation might help, other processes are necessary as well. Those other processes could just as well be implemented in one agency as in two.

What we are discussing here is of course analogous to the separation of powers for government as a whole. OSIA opposes quasi-judicial processes that bypass the actual courts, such as the “stakeholder organisations” envisaged in Art. 18.82 of TPP.

### Recommendations

- There should be clear lines of responsibility for policy and administration *within* an agency.
- IP Australia or any other agency should not have quasi-judicial powers normally exercised by the courts.

## 2.14.2 Mechanisms for separation of policy and administration

The most important mechanism is the clear delineation of ownership of these functions, as is already the case within IP Australia. Again, transparent arms-length review and commentary would be helpful.

### Recommendations

- Separate ownership of policy and administration.
- Again, create a transparent, arms-length process for policy review and commentary, similar to the former Advisory Council on Intellectual Property.

## 2.15 Negotiation of treaties

### INFORMATION REQUEST 16.3

*What features should be included in a model agreement covering intellectual property if one were to be adopted?*

OSIA can only agree with the Productivity Commission that the current processes for treaty negotiation need complete reform.

We support the Commission’s emphasis on transparency. Transparency encourages consistency. Secrecy allows for piecemeal, ad hoc decisions, such as excluding tobacco from Investor-State Dispute Settlement (ISDS) in TPP, but not any other health improvement measure the Australian government might want to undertake.

TPP also stands out as an example where secrecy was used to effect outright discrimination: select industry stakeholders in the United States had full access to the text throughout and were intimately involved in the negotiations, whereas industry stakeholders in all other Parties, including Australia, were denied such access and kept in the dark until all negotiations were completed. It is no surprise therefore that the final text is heavily skewed in favour of the small cadre of US interests who were represented at the negotiating table.

We are particularly disappointed that the government is reluctant to “signal Australia’s position to our negotiating partners”. We were under the impression that communicating our position is exactly what trade negotiators do. Australia should never negotiate in bad faith, so should never need to take the precautions associated with doing so. We support the Harper Review recommendation that there should be a more rigorous, independent and transparent process to establish negotiating mandates.

Australia has had a history of trading away important rights when they might be awkward for treaty partners. For example, sugar was excluded from the Australia-United States Free Trade Agreement (AUSFTA). It seems that making any deal is preferred to not having one, but in truth not doing a deal would be better than doing a bad deal. OSIA advocates for more structure and clarity to prevent this happening in the future. There must be a demonstrable break from our past behaviour, so negotiating partners understand that Australia means what it says.

Further, provisions on intellectual property do not belong in trade agreements at all, as both OSIA<sup>32</sup> and the Productivity Commission<sup>33</sup> have pointed out previously. OSIA supports Australia entering into true free trade agreements (those whose

<sup>32</sup>Burton, J., Holden, C. & Christie, D., *op. cit.*, pp. 3–5; Forsstrom, A. & Burton, J., *Submission to the Productivity Commission’s Inquiry into Intellectual Property Arrangements*, Open Source Industry Australia, 2015, pp. 9–10; and Burton, J. & Foxworthy, P., *Submission to the Joint Standing Committee on Treaties regarding the Trans Pacific Partnership*, Open Source Industry Australia, 2016, pp. 3–4, 8–9 & 11–12. All available at <http://osia.com.au/drupal7/publications>

<sup>33</sup>*Bilateral and Regional Trade Agreements, Research Report*, Productivity Commission, 2010, rec. 4(b) & 4(c), p. 285.

sole purposes are to reduce or better still eliminate tariffs and to increase or better still abolish quotas) on bilateral, regional or global bases. OSIA also supports Australia entering into future iterations of global (but never bilateral or regional) treaties on each individual class of intellectual property law (e.g. in the case of copyright, any true successor to the Berne Convention).

In each such case, we agree that a model agreement would help clarify goals for treaties, and ensure negotiations are conducted in a more mature, disciplined, strategic and considered way.

We agree that there should never be retrospective grants of IP rights.

### Recommendations

- Australia should never negotiate in secret, except for matters of defence and national security.
- Australia should never ratify any treaty that was negotiated in a manner biased against the interests of Australian industry.
- Australia should never negotiate in bad faith, nor even put in the place the machinery to enable doing so.
- Australia should never agree to ISDS provisions in any treaty.
- Australia should pursue further free trade agreements (whether bilateral, regional or global in scope), but only when they focus solely on free trade (to the exclusion of IP regulation and all other matters irrelevant to free trade).
- Australia should only negotiate treaties on IP regulation, when they are of global or near-global scope (not bilateral or regional) and when they focus on IP alone (to the exclusion of all other matters).
- A model agreement for IP regulation should cover the following principles.
  - Each treaty should focus on a single class of IP regulation (e.g. copyright alone or patents alone), to make the negotiation of further incremental improvements over time easier for all Parties.
  - Australia opposes any overlapping IP regulation. Each class of work, invention or other subject matter may be subject to a *maximum* of one form of IP regulation.
  - Australia must never grant retrospective IP rights.
  - Australia reserves the right to extend exemptions from IP regulation, for example extending the definition of fair dealing or providing access for disabled people to copyrighted material.
  - Australia reserves the right to take measures that improve the welfare of the Australian people, for example in the areas of health, environmental protection and consumer protection.
  - Where there might be sanctions for breaching an IP regulation, Australia reserves the right to define and vary those sanctions. For example, no foreign government or company may impose a “three strikes” policy on the Australian community.
  - Australia reserves the right to vary the length of time an IP regulation applies to a particular work or invention, so if we deem it appropriate we can reduce the period of time for patents and copyright.

## 2.16 Patent Cooperation Treaty & patent prosecution highways

### INFORMATION REQUEST 17.1

*How extensively have mechanisms such as the Patent Cooperation Treaty and patent prosecution highways been used to reduce the transaction costs of obtaining IP protection overseas?*

*Have Australian businesses utilised opportunities for licensing through SourceIP?*

*Are there other options that would facilitate and promote the licensing and transfer of intellectual property between Australia and other countries?*

### 2.16.1 Patent Cooperation Treaty and patent prosecution highways

To the best of our knowledge, OSIA’s members have not used these mechanisms. As we have stated, we oppose software patents, so a mechanism to streamline patents alone is of no benefit to our members.

### 2.16.2 SourceIP

To the best of our knowledge, no member of OSIA has licensed a patent listed on SourceIP.

We support any move by IP Australia to make patents more accessible and transparent. We encourage IP Australia to improve the ability to search for patents on SourceIP and AusPat. Our members want to identify trivial patents and prior art that might invalidate a patent application, as well as to find patents for genuine inventions to license.

### **2.16.3 Facilitating licensing and transfer of intellectual property**

We note that the transfer of IP and licensing are not the same thing. We advocate for freer transfer of IP and knowledge by reducing or eliminating the need for licensing. Transfer can be enabled by: eliminating software patents; eliminating innovation patents; shortening the time patents are in force; increasing the standards of patentability; increasing the rigour of examination of patent applications; and by prohibiting non-practising entities from being patent licensors.

Although the question discusses "facilitating" the transfer of IP, we think it is important to retain Australian examination of patents so that a flawed patent from another country does not automatically become an Australian one.

Again, as we mentioned for SourceIP above, discoverability helps. IP Australia should continue to improve searching capabilities in their websites and by other means.

## **2.17 Federal Court & Federal Circuit Court**

### **INFORMATION REQUEST 18.1**

*Would changes to the jurisdiction of the Federal Circuit Court improve access to dispute resolution by small- and medium- sized enterprises? Should additional rules be introduced, such as caps on the amount of costs claimable in a case? What is the upper limit on damages claims the court should hear?*

*Are there resourcing impediments to the proposed reforms to the Federal Circuit Court?*

*Can greater use be made of cost orders in the Federal Court, including for discovery, to reduce costs further? Should additional Federal Court rules be introduced, such as caps on the amount of costs claimable in a case?*

### **2.17.1 Changes to jurisdiction of the Federal Circuit Court**

OSIA is doubtful that a change to jurisdiction will improve access. As the Commission pointed out in its interim report, anyone hoping or expecting a favourable result will tend to mount a case in the highest court they can, to minimise the expense of appeals from their opponent.

### **2.17.2 Additional rules for Federal Circuit Court**

OSIA opposes a cap on the amount of costs claimable in a case. Costs should be judged on their merits, and some cases will be more difficult than others.

### **2.17.3 Limit on damages claims**

OSIA has no view on the upper limit of damages claims that the Federal Circuit Court might hear. We leave this issue to the legal community who will have greater familiarity with it.

### **2.17.4 Resourcing impediments to reforms of the Federal Circuit Court**

The proposed reforms to the National Court Framework make sense. Many public sector IT projects have suffered from poor governance and cost blowouts due to lock-in from suppliers providing closed source software. That could well be an impediment to implementing the reforms.

We encourage the Federal Circuit Court to design and create the IT systems to support the framework in the open using open source tools, so their investment and experience can be reused in other jurisdictions.

### **2.17.5 Greater use of cost orders**

OSIA supports genuine measures to improve efficiency in the courts and as such we endorse the Federal Court's 2015 stated aim of "identifying the genuine issues in dispute between the parties at the earliest possible stage".

### **2.17.6 Additional rules for Federal Court**

As for the Circuit Court, OSIA opposes a cap on the amount of costs claimable in Federal Court cases relating to patents and copyright.

## 3 Comments on draft findings

### 3.1 Comments on DF4.1

#### DRAFT FINDING 4.1

*Australia's copyright system has expanded over time, often with no transparent, evidence-based policy analysis demonstrating the need for, or quantum of, new rights.*

OSIA endorses the Commission's Draft Finding 4.1.

In our view Australia's copyright system has indeed expanded far beyond the point of utility. It has been extremely rare for any amendment to the *Copyright Act 1968 (Cth)* to be based on substantive evidence of any need.

Indeed, when clear evidence supporting the case for reform has been presented—almost universally supporting a *narrowing* of the copyright system—for example the Productivity Commission's report on parallel importation<sup>34</sup> and the ALRC's report on copyright and digital economy<sup>35</sup>, the Commonwealth has to date refrained from acting upon it.

Instead, expansionary reforms have been enacted as a result of pressure from a small cadre of entrenched interests—rooted mainly in the old economy—and in capitulation to the more aggressive negotiators of regional and bilateral copyright treaties masquerading as free trade agreements<sup>36</sup>.

In addition to the examples cited in the Commission's interim report (all of which are indeed prime examples of the unconstrained expansion of Australia's copyright system in the absence of supporting evidence), OSIA notes that anti-TPM-circumvention provisions were also introduced to the Act, providing new, unprecedentedly broad restrictions on use, without any meaningful analysis of their impact on the Australian economy (nor on the public good in general) having been undertaken, notwithstanding the objections raised by OSIA both at the time<sup>37</sup> and more recently<sup>38</sup>.

### 3.2 Comments on DF4.2

#### DRAFT FINDING 4.2

*While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.*

OSIA endorses the Commission's finding that the present copyright term of life plus 70 years is far longer than can possibly be warranted (as indeed is the present 50 year term for Crown copyright).

The basic arguments against extreme extensions to copyright terms have not essentially changed in last 175 years<sup>39</sup>, when the existing term of copyright was a much more realistic 28 years.

In 1841, the technology available for the dissemination of works was rather primitive, compared to what we have today. The great speed and near-zero marginal cost with which works can be distributed digitally in the modern world only adds to the strength of those arguments, suggesting that a term substantially shorter than that proposed by Macaulay ("till [the author's] death, or till the expiration of forty-two years, whichever shall first happen") would be more appropriate today.

Copyright law, by its very nature, exists to balance the public interest in providing an incentive for authors to create new and useful works against the public interest in maximising the dissemination of and access to those works.

No author can predict reliably whether a work yet to be written will be a best-seller or not, nor for how long it may remain so. An optimal copyright term therefore should be the minimum term that provides authors of useful works with a *reasonable expectation* of a sufficient return on investment to provide the necessary incentive to create.

The decision on whether or not to invest in the creation of a commercial work is no different to any other commercial investment decision. It is typically made on the basis of a discounted cash-flow analysis showing projected returns, to be compared against similar analyses for other candidate projects in order to determine which of the pool are the best investments.

<sup>34</sup>*Restrictions on the Parallel Importation of Books, Research Report*, Productivity Commission, 2009.

<sup>35</sup>*Copyright and the Digital Economy: Final Report*, ALRC Report 122, Australian Law Reform Commission, 2013.

<sup>36</sup>See also Section 2.15 on page 19.

<sup>37</sup>Scott, B., *Submission to Inquiry into Technological Protection measures (TPMs) Exceptions*, Open Source Industry Australia, 2006; Scott, B., *Submission on Exposure Drafts—Copyright Amendment (Technological Protection Measures) Bill 2006 and Regulations*, Open Source Industry Australia, 2006; Scott, B., *Submission to Senate on Copyright Amendment Bill 2006*, Open Source Industry Australia, 2006; and Scott, B., *Provisions of the Copyright Amendment Bill 2006—Supplementary Submission, including Response to Question on Notice*, Open Source Industry Australia, 2006. All available at <http://osia.com.au/drupal7/publications>

<sup>38</sup>Burton, J., Holden, C. & Christie, D., *op. cit.*, s. 2.1, pp. 6–7; Forsstrom, A. & Burton, J., *op. cit.*, p. 10; and Burton, J. & Foxworthy, P., *op. cit.*, s. 6.8, pp. 13–14.

<sup>39</sup>See T. B. Macaulay's speech in the British House of Commons, 5 Feb 1841—reproduced at <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/commentary/MacaulaySpeeches.html>

In most Australian businesses today, those analyses are done on the basis of net present value (NPV) over terms ranging from 3 to 10 years. A small number of capital-heavy industries may sometimes use up to 25 year NPVs.

Computer software development is not generally considered a capital-heavy industry and indeed most software has a useful commercial life of well under a decade. There are of course a few notable exceptions, both in terms of the quantum of development effort required and in terms of shelf life. The Unix operating system, for example, was developed in 1969-70 and is still widely used today; and the Red Hat 7.1 distribution of the GNU/Linux operating system was estimated to have required over 8,000 man-years of development effort<sup>40</sup>.

OSIA is not aware of any Australian company that makes investment decisions on the basis of returns beyond the 25 year mark.

Accordingly, we would support a reduction in copyright term in Australia to 25 years after publication (or 25 years after creation, for unpublished works), in line with the upper end of the range suggested by the Commission.

In particular it should be noted that the “life plus” element of the existing copyright term serves no useful purpose. A work is no less valuable because it was written close to the end of the author’s life. On the contrary, such works are probably *more* valuable, as the author has by that time presumably amassed far greater experience and expertise.

### 3.3 Comments on DF16.1

#### DRAFT FINDING 16.1

*Model agreements on intellectual property would have the benefit of being fully transparent to Australian industry and to the broader community, as well as to foreign governments, so that all stakeholders are aware of what Australia sees as the ideal outcomes from a treaty.*

OSIA endorses the Commission’s Draft Finding 16.1.

We support the principle that Australia should have clear goals when we negotiate IP treaties. A model agreement would indeed bring greater transparency to what benefits are expected, and would reduce the risk that ad hoc negotiation trades away so many benefits that none are left.

We note however that IP provisions are totally incongruous in (and indeed anathema to) free trade agreements, since IP provisions are inherently about restrictions on trade, which is the opposite of free trade.

Model agreements, like desirable treaties themselves, ought to focus on a single self-contained policy domain, such as *either* free trade *or* intellectual property law, but *never* both.

### 3.4 Comments on DF17.1

#### DRAFT FINDING 17.1

*Approaches to international cooperation and lowering transaction costs will be most effective when pursued multilaterally rather than through bilateral arrangements. Moreover, harmonisation of laws is not the sole, or necessarily desirable, form of cooperation. Other approaches to international intellectual property cooperation can achieve their goals at lower cost and with greater flexibility.*

OSIA endorses the Commission’s finding. There may be an asymmetry of influence when Australia negotiates with a much larger country. That can be tempered when we are part of a community of countries with similar interests.

Harmonisation of laws should always be secondary to drafting good laws, and indeed eliminating bad ones.

### 3.5 Comments on DF18.1

#### DRAFT FINDING 18.1

*The evidence suggests timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.*

OSIA wholeheartedly endorses the Commission’s finding.

We support copyright for software and other creative works. The creator should have the right to say how it can be used. Indeed, copyright law underpins open source licences, both permissive licences where the creator only requires acknowledgement, and “copyleft” licences, where you may share someone else’s work provided you share your own as well.

OSIA opposes excesses in copyright enforcement. We are convinced there has been overreach in many of the claims of rights holders.

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<sup>40</sup>Wheeler, D. A., *More Than a Gigabuck: Estimating GNU/Linux’s Size*, 2001, revised 2002. Available at <http://www.dwheeler.com/sloc/redhat71-v1/redhat71sloc.html>

For example AFACT's own research<sup>41</sup> shows that one-third of consumers of unauthorised music and movies subsequently bought an authorised version. That proportion will likely increase if it becomes easier and more convenient to obtain music and movies, and increase further if the price to the consumer reflects the vast reduction in costs that has been brought by electronic distribution.

In the US, the RIAA suggested that by their reckoning, statutory damages for a month of unauthorised downloads from one site alone should exceed the annual GDP of France<sup>42</sup>. Clearly, this has no connection with the economic damage to rights holders.

Penalties for personal use of unauthorised copyrighted material should reflect the economic impact of the crime, in other words fines of tens of dollars.

Internet providers should not be expected to breach the privacy of their customers on mere suspicion of piracy, nor expected to pay the costs of a right holders' copyright enforcement for no benefit.

To our mind, iiNet's proposed co-operative scheme for internet providers and rights holders<sup>43</sup> is quite balanced, and it is dismaying that it was rejected by organisations like AFACT, AIIA and MIIA.

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<sup>41</sup>AFACT, *Economic consequences of movie piracy*, January 2011. Available at [http://www.creativecontentaustralia.org.au/\\_literature\\_123025/Economic\\_Consequences\\_of\\_Movie\\_Piracy](http://www.creativecontentaustralia.org.au/_literature_123025/Economic_Consequences_of_Movie_Piracy)

<sup>42</sup><http://boingboing.net/2006/05/19/is-one-months-piracy.html>

<sup>43</sup><http://www.iinet.net.au/about/mediacentre/papers-and-presentations/201103-encouraging-legitimate.pdf>



## 4 Comments on draft recommendations

### 4.1 Comments on DR4.1

#### DRAFT RECOMMENDATION 4.1

The Australian Government should amend the *Copyright Act 1967* (Cth) so the current terms of copyright protection apply to unpublished works.

It is important to remember that the purpose of copyright is to encourage the creation *and dissemination* of useful works.

As such, any sensible copyright system would be designed to *encourage* publication and to *discourage* the holding of unpublished works, since there is no public interest in providing monopoly status to authors who choose not to publish their works.

The only legitimate purposes of allowing copyright to subsist in unpublished works are to protect unfinished works and to protect authors who are still in the process of arranging publication. Perhaps three centuries ago, when the *Statute of Anne* first granted indefinite copyright on unpublished works, it might have been reasonable, given the heavy censorship practised in most jurisdictions and the widespread collusion between the publishers of the day, to assume that it might take several lifetimes for a particularly controversial, but nevertheless useful, work to be published. Today however, thanks in no small part to the Internet, any author can publish any work expeditiously, so there is no good reason for any useful work to remain unpublished for long.

The House of Lords had the good sense to extinguish perpetual copyright in published works a quarter of a millennium ago<sup>44</sup>. It is outrageous that perpetual copyright remains possible today for unpublished works.

OSIA agrees with the Commission that limiting the term of copyright on unpublished works to the same term as granted for published works would be an improvement over the status quo. However, such a measure would still fall tremendously short of the mark.

We contend that, as a first step, the term of copyright in unpublished works should be returned to the current globally agreed minimum standard of 50 years from creation<sup>45</sup>.

If, as suggested by the Commission and supported by OSIA<sup>46</sup>, steps are then to be taken to negotiate a return to a more sensible global standard term for published works of, say, 25 years from publication, it would make sense to include in that treaty (presumably a future iteration of TRIPS) a substantially shorter term for unpublished works, say 8–10 years.

Further, whilst the new globally agreed standard term for copyright in published works should probably remain a minimum, in the case of unpublished works it may make sense also to provide for a *maximum* term of protection, perhaps at the mid-point between the new minimum term for unpublished works and the new minimum term for published works.

#### Recommendations

- At the earliest possible opportunity, the term of copyright in unpublished works should be limited to 50 years from creation.
- Australia should take a leading role in opening negotiations for a revision (or successor) to TRIPS, with a view to setting the new globally agreed minimum copyright terms to 25 years from publication (for published works) and 8–10 years from creation (for unpublished works). If and when such a treaty can be negotiated, Australia should set its domestic copyright terms for new works to the new globally agreed minimum terms.
- Consideration should be given to the possibility of agreeing (in a global treaty) a maximum copyright term for unpublished works.

<sup>44</sup>*Donaldson v. Becket* (1774) 2 Bro. PC 129; 1 ER 837.

<sup>45</sup>TRIPS, Art. 12.

<sup>46</sup>See Section 3.2 on page 22.

## 4.2 Comments on DR5.1

### DRAFT RECOMMENDATION 5.1

The Australian Government should implement the recommendation made in the House of Representatives Committee report *At What Cost? IT pricing and the Australia tax* to amend the *Copyright Act 1968 (Cth)* to make clear that it is not an infringement for consumers to circumvent geoblocking technology.

The Australian Government should seek to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.

### 4.2.1 Amending the Act

OSIA supports the recommendations of both the Productivity Commission and the House of Representatives Committee before it that the *Copyright Act 1968 (Cth)* should be amended to remove anti-circumvention measures for geoblocking TPMs.

However, those recommendations do not go far enough. In OSIA's view, there is no need for geoblocking to be treated as a special case. All anti-TPM-circumvention measures are at best superfluous, at worst outright dangerous.

As OSIA have previously argued on numerous occasions<sup>47</sup>, anti-TPM-circumvention provisions in general have no possible public policy purpose.

Where a TPM is circumvented in the course of infringing copyright, it is the act of copyright infringement itself (and not the incidental act of TPM circumvention) that ought to be actionable and indeed already is and had been for centuries before the introduction of prohibitions on TPM circumvention. In such cases, prohibitions on TPM circumvention are thus entirely superfluous.

Circumventing a TPM *without* also infringing copyright causes no harm to anybody. Indeed, doing so is often necessary in order for a licensee to enjoy the rights accorded to him by the various exceptions enshrined in the Act<sup>48</sup>. In such cases, attaching civil (or worse still criminal) liability to the act of circumvention is pernicious and not in the interests of anybody, other perhaps than those who seek to impose arbitrary and unnecessary restrictions on the public which go far beyond those enabled by copyright.

#### Recommendation

- All anti-TPM-circumvention provisions should be repealed from the *Copyright Act 1968 (Cth)*.

### 4.2.2 International agreements

OSIA supports the Commission's recommendation to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking TPMs.

Again, we believe that recommendation does not go far enough, for the same reasons outlined above. There is no need to make a special case of geoblocking: the policy of avoidance should apply to international agreements that seek to prevent consumers from circumventing *any* TPM.

#### Recommendation

- The Commonwealth should refuse to be a party to any treaty that requires the act of TPM circumvention (as opposed to actual acts of copyright infringement) to be prohibited.

<sup>47</sup>Scott, B. *op. cit.*; Burton, J., Holden, C. & Christie, D., *op. cit.*; Forsstrom, A. & Burton, J., *op. cit.*; and Burton, J. & Foxworthy, P., *op. cit.*.

<sup>48</sup>See Section 2.1 on page 7

### 4.3 Comments on DR5.2

#### DRAFT RECOMMENDATION 5.2

The Australian Government should repeal parallel importation restrictions for books in order for the reform to take effect no later than the end of 2017.

OSIA welcomes and supports the Commission's recommendation to repeal parallel importation restrictions (PIRs) on books.

Whilst some of OSIA's members publish books, a far greater proportion purchase books, so we speak here primarily as a group of licensees (cf. the matters relating to computer software, on which we speak primarily as a group of licensors).

We mention this to highlight the fact that PIRs are not *solely* a burden on consumers. Australian businesses—even in high-tech industries such as the open source software sector—also continue to have a need for books (mainly those on technical subject matter). It is possible that the impact of PIRs on Australian businesses who buy books may be even greater on a per-transaction basis (although not presumably on an aggregate basis) than the impact on Australian consumers.

When a business needs to buy a book, it is typically for a specific, urgent purpose—not merely on a whim. In such cases, rapid delivery is a key requirement. For that reason, our members would far rather deal with Australian booksellers than with those located overseas, all other things being equal. The trouble with PIRs is that they ensure that all other things are almost never equal.

It is worth noting that the price differentials seen on books of a highly technical nature tend to be far greater than the average across all books. There is anecdotal evidence of domestic prices of some technical books being more than double overseas market prices.

When air-freighting a book in from an American or European bookseller can sometimes be a more attractive proposition than purchasing the same book locally, it is clear that the domestic market is artificially distorted.

Some may argue that the answer is simply to purchase all books from overseas in digital formats. Indeed, many of our members do just that, when the book in question comes from one of those few enlightened publishers who guarantee all their digital editions to be DRM-free (the most prominent example in our sector being the USA-based O'Reilly Media<sup>49</sup>).

However, having first-hand knowledge of the dangers of TPMs in general<sup>50</sup>, our members realise that no DRM-encumbered digital edition can ever be an acceptable substitute for a printed edition. So long as both PIRs and anti-TPM-circumvention laws persist, our members are forced either to bypass the domestic market for books altogether or to suffer the severe price discrimination engendered by PIRs.

#### Recommendation

- The Commonwealth should implement the Productivity Commission's Draft Recommendation 5.2 as is.

<sup>49</sup><http://shop.oreilly.com/category/customer-service/ebooks.do>

<sup>50</sup>See Section 4.2

## 4.4 Comments on DR5.3

### DRAFT RECOMMENDATION 5.3

The Australian Government should amend the *Copyright Act 1968* (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.

The new exception should contain a clause outlining that the objective of the exception is to ensure that Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.

The exception should be open ended, and assessment of whether a user of copyright material is fair should be based on a list of factors, including:

- the effect of the use on the market for the copyright protected work at the time of the use
- the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work
- the commercial availability of the work at the time of the infringement
- the purpose and character of the use, including whether the use is commercial or private use.

The Copyright Act should also specify a non-exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.

The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.

OSIA welcomes and supports the Commission's recommendation to replace the existing fair dealing exceptions of the *Copyright Act 1968* (Cth) with a far broader, open-ended fair use exception.

Concerns expressed around initial judicial uncertainty are unfounded. OSIA has confidence that the Australian judiciary will have no difficulty in developing a sound, just body of precedent around the interpretation of the proposed exception. If the price Australia pays for a fair use exception is a temporary increase in copyright litigation while those precedents are being developed, it is a small price to pay.

In addition to enshrining the non-exhaustive lists of fairness factors and illustrative exceptions in the Act (and naturally the judiciary's discretion to expand those lists as and when novel and deserving cases arise), OSIA sees value in the approach taken in the *Copyright Act 2007* (Israel) of providing the Minister responsible with a further discretion to prescribe additional fair uses. Such a dual-pronged approach would no doubt help the fair use exception keep pace with technological developments, in a way that the existing fair dealing exceptions have not.

### Recommendation

- The Commonwealth should implement the Productivity Commission's Draft Recommendation 5.3. Ideally, the amendment should also grant the Minister responsible the discretion to declare additional fair uses.

## 4.5 Comments on DR7.1

### DRAFT RECOMMENDATION 7.1

The Australian Government should abolish the innovation patent system.

OSIA welcomes and supports the Commission’s recommendation to abolish the innovation patent system (IPS).

We have previously made the same recommendation in our submissions to the ACIP<sup>51</sup> and IP Australia<sup>52</sup> reviews.

In brief, and leaving aside for the moment the specific issues with respect to patents of any class on computer software<sup>53</sup>, the IPS is counter-productive as a result of the meaninglessly low bar set for the “innovative step”, coupled with the complete uncertainty generated by the practice of grant without examination.

Fixing those two defects would result in a reformed IPS that would be almost indistinguishable from the standard patent system and therefore redundant. So clearly the best solution is complete abolition of the IPS, as recommended by OSIA in 2013, by ACIP in 2015 and most recently by the Commission.

### Recommendation

- The Commonwealth should implement the Productivity Commission’s Draft Recommendation 7.1 as is.

## 4.6 Comments on DR8.1

### DRAFT RECOMMENDATION 8.1

The Australian Government should amend s. 18 of the *Patents Act 1990* (Cth) to explicitly *exclude* business methods and software from being patentable subject matter.

OSIA welcomes and supports the Commission’s recommendation to exclude business methods and software from being patentable subject matter.

We have previously made the same recommendation with respect to computer software in our submissions to DFAT<sup>54</sup>, ACIP<sup>55</sup>, IP Australia<sup>56</sup> and JSCOT<sup>57</sup>; and with respect to business methods in our submission to ACIP<sup>58</sup>. Rather than repeat our arguments at length here, we refer the reader to those prior submissions.

OSIA shares the Commission’s concern about the difficulties inherent in defining what is and is not software (or even more confusingly, whether software is or is not embedded). As noted already<sup>59</sup>, given that software is the only class of work presently subject both to copyright and to patents simultaneously, we recommend that the amendment to exclude software be drafted such that *no copyrightable work* may be patented.

Words to that effect will avoid neatly any question of defining “software” or “embedded software” in the *Patents Act 1990* (Cth), relying instead on the existing, well tested body of law concerning what is or is not copyrightable.

OSIA is not aware of any such generic approach for excluding business methods. However, we suspect that defining “business method” for the purpose of the new exclusion will prove rather less problematic than defining “software” would.

### Recommendation

- The Commonwealth should implement the Productivity Commission’s Draft Recommendation 8.1. The exception for software should be implemented as an exception for all copyrightable works.

<sup>51</sup>Burton, J., Hideo, M., Christie, D. & Jitnah, D., *Submission to the Australian Council on Intellectual Property Review of the innovation patent system*, Open Source Industry Australia, 2013. Available at [http://www.osia.com.au/drupal7/sites/default/files/default/osia\\_sub\\_201310\\_acip.pdf](http://www.osia.com.au/drupal7/sites/default/files/default/osia_sub_201310_acip.pdf)

<sup>52</sup>Burton, J., *Submission to IP Australia regarding ACIP’s revised recommendation on the innovation patent system*, Open Source Industry Australia, 2015. Available at [http://www.osia.com.au/drupal7/sites/default/files/default/osia\\_sub\\_201508\\_ip\\_au.pdf](http://www.osia.com.au/drupal7/sites/default/files/default/osia_sub_201508_ip_au.pdf)

<sup>53</sup>See Section 2.6 on page 11 and Section 4.6.

<sup>54</sup>Burton, J., Holden, C. & Christie, D., *op. cit.*, p. 8.

<sup>55</sup>Burton, J., Hideo, M., Christie, D. & Jitnah, D., *Ibid.*

<sup>56</sup>Burton, J., *Ibid.*

<sup>57</sup>Burton, J. & Foxworthy, P., *op. cit.*, p. 12.

<sup>58</sup>Burton, J., Hideo, M., Christie, D. & Jitnah, D., *Id.*, p. 11.

<sup>59</sup>See Section 2.6.4 on page 12

## 4.7 Comments on DR14.1

### DRAFT RECOMMENDATION 14.1

The Australian Government should repeal s. 51(3) of the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act).

The Australian Competition and Consumer Commission should issue guidance on the application of part IV of the Competition and Consumer Act to intellectual property.

OSIA welcomes and supports the Commission's recommendation to repeal s. 51(3) of the *Competition and Consumer Act 2010* (Cth).

As noted previously<sup>60</sup>, all forms of IP are inherently anti-competitive—limited monopolies are monopolies nonetheless—and that is acknowledged implicitly in the recognition of a need for copyright, patent and trade mark regimes.

It is precisely *because* IP is inherently anti-competitive that it is important to have sufficient safeguards in place against the potential abuse of the limited monopolies granted by IP.

Whilst some safeguards are in place already by virtue of the exception in s. 51(3) not extending to contraventions of ss. 46, 46A or 48, that would seem insufficient to guard against the full range of potential abuses.

OSIA's position is that, due to the very nature of IP, commercial dealings in IP and related rights should, if anything, be subject to *greater* safeguards against anti-competitive trade practices than are other forms of commercial dealing. Repealing s. 51(3) will be a good first step in the right direction.

We agree with the Commission on the importance of establishing clarity around the application of Part IV of the Act immediately following the repeal of s. 51(3). However, we would prefer to see such guidance enshrined in a statutory instrument, rather than issued by the ACCC.

The ACCC has a vital role to play in *enforcing* the Act. In OSIA's view it is not appropriate for a single agency both to set the rules and to enforce them. We see such arrangements as an unacceptable departure from the doctrine of the separation of powers.

### Recommendation

- The Commonwealth should implement the Productivity Commission's Draft Recommendation 14.1. Ideally, any formal guidelines for interpretation should be enshrined in a statutory instrument.

## 4.8 Comments on DR15.1

### DRAFT RECOMMENDATION 15.1

All Australian, and State and Territory Governments should implement an open access policy for publicly-funded research. The policy should provide free access through an open access repository for all publications funded by governments, directly or through university funding, within 12 months of publication. The policy should minimise exemptions.

The Australian Government should seek to establish the same policy for international agencies to which it is a contributory funder, but which still charge for their publications, such as the Organisation for Economic Cooperation and Development.

OSIA supports the Commission's recommendation to establish Government-wide policies mandating open access to all works resulting from publicly-funded research.

We also agree with the Commission that the Commonwealth should encourage all international bodies to which it contributes funding to institute similar policies.

However, we are concerned that the proposed policy does not go far enough, on two grounds.

### 4.8.1 Scope: works covered

The argument that no taxpayer ought to be asked to pay again for access to works the development of which was funded publicly applies equally to *all* works developed with public funds, not just to those developed within the confines of the research community.

<sup>60</sup>Forsstrom, A. & Burton, J., *op. cit.*, p. 9.

OSIA sees no benefit in limiting the new policy to research publications. Such a policy should apply to all works of any form developed with public funds for any purpose (other than those which, for reasons beyond the scope of IP policy, must not be published at all in order to protect the privacy of citizens or the secrecy of sensitive military operations).

### Recommendation

- The proposed open access policy should cover all publicly funded works (not solely those developed in the research community) of any class (not solely literary works).

#### 4.8.2 Effect: rights granted

We note that when such a policy is drafted, the definition chosen for “open access” or “free access” will be especially important.

The term “free” is especially problematic, as in English it carries two independent meanings: “not restricted” and “gratis”.

In the free software community, when we speak of “free software” we are using the former meaning: software which guarantees certain essential freedoms to the end user.

In the context of fostering dissemination of publicly funded works, on the other hand, it is important that *both* meanings are preserved in the definition.

That the policy should require that the works be made available gratis is clear from the original justification: it is iniquitous to ask the taxpayer to pay for the same work twice.

However it is also important to ensure that the policy does not permit restriction of the end user’s freedoms in relation to the published works.

The Free Software Definition (FSD)<sup>61</sup> describes four freedoms that the end user must be granted in order for software to be considered Free, the freedoms: to use it for any purpose; to study how it works and modify it to suit one’s own needs; to redistribute verbatim copies; and to redistribute modified copies.

OSIA contends that where public funds are expended in the development of a work (of any type, including but not limited to computer software), ensuring that citizens are granted those four freedoms in relation to the work is just as important as ensuring that taxpayers do not have to pay for it twice. This is in no small part because the overall utility of a work (particularly in the case of computer software) extends well beyond what can be achieved through mere access to it.

We are aware of at least two policy options for achieving that end.

The *Copyright Act 1976 (USA)* provides that all works produced and published by the US Government are placed in the public domain (so therefore are not subject to copyright at all). Unfortunately, by limiting its application to works that are *both* produced *and* published by the Government, the US approach suffers from a massive loophole: agencies seeking to restrict public rights in relation to works they produce can do so simply by outsourcing the publication. Nevertheless, a more carefully drafted implementation of the US approach could be particularly effective.

In Australia, that would of course require the abolition of crown copyright. But crown copyright is an odd and rather incongruous creature in the first place: surely the Commonwealth has no need of any legal construct with which to motivate *itself* to produce more or better works?

A less drastic approach would be to require that all works developed with public funds be released under suitably free and open licence conditions. For example, for computer software, that might mean licences that comply with the FSD or with the OSD<sup>62</sup>; for literary works one of the Creative Commons<sup>63</sup> licences or something similar; or for data sets one of the licences endorsed by the Open Knowledge Foundation<sup>64</sup>.

Incorporating either approach into a broad open-access policy would enhance the potential for new and creative uses of publicly funded works.

### Recommendation

- The Commonwealth should implement the Productivity Commission’s Draft Recommendation 15.1. The proposed open access policy should require that publicly funded works either be placed in public domain or be released under free and open licence terms.

<sup>61</sup> Stallman, R., *op. cit.*

<sup>62</sup> Perens, B., *op. cit.*

<sup>63</sup> <http://creativecommons.org.au/>

<sup>64</sup> <http://opendatacommons.org/licenses/>

## 4.9 Comments on DR17.1

### DRAFT RECOMMENDATION 17.1

*Australia should revive its role in supporting opportunities to promote global cooperation on intellectual property policy among intellectual property offices through the World Intellectual Property Organization and the World Trade Organization to avoid duplication and reduce transaction costs.*

OSIA agrees with the Commission's recommendation.

We have been disappointed with the outcomes of negotiations for bilateral treaties. Our members have been adversely affected by duplicated regulation, with both patents and copyright applying to our work. Software is easy to distribute, so good and innovative Australian software finds a worldwide audience. Duplication and mismatches in IP regulation around the world are a significant impediment to our members.

The stalling of the Doha Round is often used as an excuse for pursuing bilateral and regional trade agreements (BRTAs). However, what is usually not mentioned is *why* the Doha Round stalled. It is clear to OSIA that the "single undertaking" premise is fundamentally flawed.

Rather than pursuing counter-productive "mini Dohas" in the form of BRTAs, Australia should pursue *both* genuine free trade agreements (those that focus solely on elimination of tariffs and TRQs) on a bilateral & regional basis *and* sensible revisions to or replacements for IP treaties (such as TRIPS, the Berne Convention and the Rome Convention) on a global basis.

We note that the Productivity Commission also reached similar conclusions in the past<sup>65</sup>.

### Recommendations

- The Commonwealth should implement the Productivity Commission's Draft Recommendation 17.1 as is.
- The Commonwealth should implement Recommendations 4(b) & 4(c) from the Productivity Commission's 2010 report on bilateral & regional trade agreements.

## 4.10 Comments on DR18.1

### DRAFT RECOMMENDATION 18.1

*The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the Copyright Act 1968 (Cth).*

OSIA agrees with the Commission's recommendation.

The distinction between a carriage service and an online service provider is difficult to make, and several of the largest telecommunications companies in Australia now offer substantial content: online video-on-demand TV shows, movies, music and live sports coverage.

It would be unfair if one organisation was prosecuted for a copyright breach, where another was exonerated because one division of the organisation happened to be a carriage service.

### Recommendation

- The Commonwealth should implement the Productivity Commission's Draft Recommendation 18.1 as is.

<sup>65</sup>Productivity Commission, 2010, *op. cit.*