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The Secretary

Digital Economy Future Directions

Consultation Paper

Department of Broadband, Communications and the Digital Economy

By email: DEFutureDirections@dbcde.gov.au

Dear Secretary,

## **Submission to Digital Economy Future Directions Consultation Paper**

### **1. Introduction**

1.1 Open Source Industry Australia Limited (OSIA) welcomes the opportunity to make a submission to this inquiry. OSIA is concerned that Australian Governments are falling substantially behind world best practice in the adoption of open commercialisation methodologies. OSIA is pleased to see the Federal Government taking a proactive approach to providing broader access to public sector information and looks forward to the Government setting a standard for the States and Territories to follow.

### **2. Summary of Recommendations**

2.1 Australian Government should:

- (a) (when deciding whether or not adopt an open commercialisation for specific PSI) give no weight to its own inability to predict the success of such a commercialisation (eg BIND);
- (b) adopt a presumption of open commercialisation of PSI unless there is a reason for not doing so;
- (c) adopt open data formats for the storage of all PSI;
- (d) refactor production processes to open PSI earlier in the production cycle;
- (e) non copyright issues (eg defamation, privacy, false endorsement etc) should not be dealt with in licence terms. So far as possible these should be dealt with under normal law;
- (f) adopt a policy that all PSI which is commercialised should be commercialised by



default under open (preferably FLOSS) licences. This does not preclude commercialisation under other licences in parallel;

- (g) establish broad exemptions to damages, account of profits and criminal liability in the event of *bona fide* distributions, with “bona fide” to be determined by the distributing industry;
- (h) establish clear rights to interoperate in the legislation;
- (i) make the grant of copyright and patent licences subject to the whole of Part IV of the Trade Practices Act.

### **3. About this Submission**

- 3.1 I am a director of OSIA. I make this submission on behalf of that company. The topics covered by the inquiry's Consultation Paper are broad ranging and a detailed response on all of them is beyond the scope of this submission.
- 3.2 Some commentators draw a distinction between “commercialisation” and “open access”. OSIA believes this terminology is not appropriate. Indeed, open access *is a form of* commercialisation. For example, open access is the substantial method of commercialisation within the open source industry. The Government should consider using terms such as “open commercialisation” to emphasise the positive role that release of information plays in the economy. Terms such as “open access” not only mask this role, but imply it is in a separate category from commercialisation.
- 3.3 In this submission we refer to “open commercialisation”. We use this term to mean access on terms which permit use, modification, distribution and re-use without purpose or geographically based restrictions. This therefore specifically excludes many AESharenet and Creative Commons licences (which have, for example, purpose based restrictions such as educational use and/or non-commercial use). We provide some comments on the policy justification for avoiding purpose based restrictions below.
- 3.4 We use the term FLOSS to refer to “Free, Libre and Open Source Software”.

### **4. About OSIA**

- 4.1 OSIA is a not for profit organisation. It was established as a company limited by guarantee in 2004 to represent the interests of the open source industry in Australia. All of OSIA's members are businesses. OSIA membership comprises mostly SMEs from around Australia, but it also counts large organisations and multinationals among its membership. All of OSIA's members are copyright owners. The exploitation of copyright is a critical component of the business of all OSIA members.

## **Observations on Questions in Section C-1 “Open Access to Public Sector Information”**

### **5. Economic Growth from Open Commercialisation**

- 5.1 One of the main purposes of FLOSS licences is to create a functional free market for information which is roughly analogous to free markets for physical things. By reducing transaction costs information is able to flow as quickly as possible to where it can be used most effectively. The general argument in favour of access to information is roughly the



same as the argument in favour of institutional democracy given by Hayek.<sup>1</sup> The vast majority of PSI is currently underutilised.

- 5.2 In July 2006 John Houghton and Peter Sheehan published a paper on The Economic Impact of Enhanced Access to Research Findings.<sup>2</sup> This paper attempts to factor open commercialisation conditions into a standard growth model. The paper suggests that open commercialisation has substantive, direct and continuing benefits to economic growth.

## 6. Licensing Issues

- 6.1 In our view, the adoption of open commercialisation of PSI is a separate question to that of how PSI should be published. Open commercialisation is simply one part of the infrastructure necessary to build active communities in relation to content which has been so released. Such a community often benefits from publicity early in the community's growth, but some communities do not need such action to promote growth. All communities have a critical mass at which they become self sustaining. However, different communities have different critical masses, so additional promotional effort may be welcome in some cases.
- 6.2 Government should not attempt to foretell what information will be used where or how. The benefit of open access is that those people best suited to understand the best use of any particular item of information will have access to it to be able to use it. To consider any information to be valueless is merely an admission of ignorance. For example, the BIND (Berkeley Internet Name Daemon) program – this program translates human readable text to IP number strings. Once thought to be of only academic value, the open commercialisation of BIND has resulted in the worldwide multibillion dollar internet name registry industry.
- 6.3 Government should adopt a policy of commercialising PSI through open commercialisation as a default for all PSI (or at the least for all PSI which would have otherwise been publicly available). Government should not attempt to pick information winners, it should leave this function up to the market. The Government should concern itself with identifying content which is not appropriate for release and removing it from the default open commercialisation path.
- 6.4 In OSIA's view, economic benefits are maximised when data sets are presented in interoperable formats. To the extent possible, release of PSI should be in fully interoperable data formats. This includes that the format is fully specified, has no encumbrances (eg patents in particular), is developed and maintained in an open and transparent process and has no closed dependencies.
- 6.5 In the decision between closed licensing and Creative Commons or AESSharenet licensing, even those with purpose based restrictions, OSIA would support the use of Creative Commons or AESSharenet licences. However, OSIA believes these licensing schemes are often inconsistent with FLOSS licences which may cause difficulties in bundling the data with open source toolsets. Licences from the FLOSS stable are therefore better choices.
- 6.6 OSIA believes licences with purpose limitations are not appropriate for government

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1 In short, that individual actors are the best to determine how best to maximise their own benefits because they have the best access to information particular to their circumstances. See, eg. F. A Hayek, *The Constitution of Liberty*, Routledge Classics, 2006

2 <http://www.cfses.com/documents/wp23.pdf>



because:

- (a) such licences inappropriately discriminate against different classes of citizen (eg those engaged/not engaged in education, business, commercial activity etc);
- (b) such licences have substantial opportunity costs which may be unforeseen (eg a student who uses “education-only” material while a student must abandon that material and recreate something equivalent when they later enter the workforce or set up their own business. They may only realise this when it is too late);
- (c) purpose limited licences create transaction costs (in that a person must determine whether their activities are within or outside the scope of the licence – moreover they ought also determine whether what they do in the future will be covered as well);
- (d) purpose limited licences suppress valuable contributions (for example, businesses are the most likely to have need for supplements to specific content, if they are excluded from the core content they will not fund extensions).

- 6.7 See Why Non Commercial Licences are Bad<sup>3</sup> for a discussion of one particular example of purpose based restrictions.
- 6.8 In respect of transaction costs, the value of open commercialisation regimes is that a large number of small contributions can be aggregated into a single thing of value greater than the sum of the component parts. Small contributions have a small value and will not be made if it involves a transaction cost which is large *in comparison to the value of the contribution*. As such, even minor increases in transaction costs can have a substantial impact on the functioning of the market. Systems (such as unusual licensing schemes) which inherently increase transaction costs should be approached with extreme caution.
- 6.9 Licensing schemes such as Creative Commons have *not* been designed with the intention of promoting secondary markets for licensed materials. Governments should be primarily concerned with establishing and protecting functional markets for information. Open commercialisation is a necessary precondition for such a market. As such licensing schemes such as Creative Commons should be approached with caution, especially those with purpose based restrictions. In OSIA's opinion many of the licences in these schemes are intended to appeal to individual authors and do not reflect an appropriate policy approach for the commercialisation of PSI (OSIA also suspects that many individuals using these licences do not have a clear understanding of their implications). In OSIA's view, Government should primarily be using open source licences because these are compatible with the broader policy objective. Of the Creative Commons licences, OSIA believes Attribution and Attribution-ShareAlike (and CC-GPL) are the only licences compatible with the policy objectives. Of AEsSharenet licences: AEsSharenet-U and perhaps AEsSharenet-S may be appropriate.
- 6.10 Governments around the world have investigated options for vanity licences (open commercialisation licences which are specific to that government). OSIA is not aware of any vanity licence which has been successful. On the contrary, vanity licences create transaction costs by isolating the content the subject of the licence from mainstream

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<sup>3</sup> <http://brendanscott.wordpress.com/2008/09/02/why-non-commercial-licences-are-bad/>



licensing practices. Regardless of whether or not a licence meets policy objectives, simply understanding a new licence is a cost. Its unfamiliarity will necessarily reduce the size of the market. If, as many government vanity licences tend to be, it is inconsistent with community expectations, then the licence will poison any value open commercialisation may have for the PSI (eg: the recently approved EU open source vanity licence includes an express provision permitting licensees to jettison the vanity licence and adopt one of the better known open source licences instead). OSIA does not rule out the possibility that specific circumstances will warrant a vanity licence. However, vanity licences should be approached with the utmost caution.

6.11 Finally, OSIA would not object to PSI being made available as “public domain” or copyright free as for material produced by the Federal Government in the United States. OSIA would classify such a release as a form of open commercialisation.

6.12 See also OSIA's submission to the National Innovation Review.<sup>4</sup>

## **7. What should be openly commercialised?**

7.1 Any data, the creation of which is wholly or mainly funded by public funds should be considered to be within the meaning of public sector information.

7.2 Any data for which there is reasonable justification that it ought not be made public should not be subject to an open commercialisation regime. However, if the data is conditioned in some way (eg anonymised) it may be appropriate for inclusion in such a regime. The FOI criteria would be a good starting point.

7.3 The PSI which will be commercialised on a closed basis may be an appropriate category for exclusion from an open default. However, in order to be considered appropriate for closed commercialisation there should be a fully costed business plan, a well mapped out understanding of the costs and benefits (including the opportunity costs of the community not being able to have free access to the information) and a firm commitment to proceed with such a commercialisation. If the mere possibility for closed commercialisation is permitted to justify exclusion from an open commercialisation program a far too broad category of information will be encumbered, with an associated enormous opportunity cost to the community.<sup>5</sup>

## **8. Pricing and Benefits of Open Commercialisation**

8.1 Open commercialisation is a precondition to a functioning free market. The benefits of open commercialisation must therefore be self evident. Any restrictions on access necessarily restrict the market and therefore constrain economic growth.

8.2 To pose questions about pricing access to PSI misconceives the open commercialisation model. Under open commercialisation, by providing rights of use, reuse and distribution, the government reduces its costs to merely maintain an information resource at its current value. Moreover, by permitting modification and re-use, it leverages the contributions of others, either as direct improvements or by the addition of complementary value added

<sup>4</sup> Available from <http://osia.net.au/files/OSIA-innovationreview-30Apr2008.pdf>

<sup>5</sup> See *Supercharging Innovation, Why The State Should Release Its Software Under An Access Regime* <http://opensource.law.biz/publications/papers/BScottSwareAccessRegime031001.pdf>



products (or data sets).

- 8.3 Charging for *a licence to use* PSI is inconsistent with open commercialisation. To charge for *access to PSI* is not inconsistent with open commercialisation, provided that subsequent reuse, and distribution subsequent to access, is on open terms.
- 8.4 Government should recognise that it has always provided open commercialisation to certain data sets of PSI. Weather reports are an obvious example. It provides this information openly because the net benefit to citizens by doing so is greater than it is for charging for it, or commercialising it on a closed basis.

## 9. Open Commercialisation and Externalities

- 9.1 The question for Government should be what benefit is there from keeping a data set closed. There will undoubtedly be cases where the Government can run a profitable information business based on the sale of PSI. In this case the benefit to the community through Government profit must be weighed against the costs to the community in lost opportunity. There is an IP ideology endemic in government which overvalues profits to individuals through the grant of monopolies and completely ignores the opportunity costs to society which flow from the grant of these monopolies. This ideology has the particularly pernicious effect of enforced under-utilisation of the great mass of PSI.
- 9.2 A concern sometimes raised is whether the release of certain content will give a benefit to some class of third party – commercial interests are often the target of such attacks. From the perspective of government setting policy for the release of publicly funded information this view is not only inappropriate, it is misguided.
- 9.3 For example, whether or not the stranger who walks down your street will like your flowerbed should be independent of whether or not you plant the bed. Rather, that decision should be based on whether the benefit to you is sufficient to justify the effort involved. To adopt any other approach would be cutting off your nose to spite your face. *In short, positive externalities (benefits to third parties) are not relevant to the decision making process.*
- 9.4 There is a disturbing and dangerous ideology, promoted by interests opposed to functioning markets for information, to the effect that a benefit to a third person is a loss to the creator of something. This ideology is repudiated by activities in the economy generally and should be repudiated in respect of information. We do not, for example, complain that a chairmaker ought to be compensated when someone sits on a chair that they have sold. This is because the chairmaker is compensated when they sell the chair. What happens subsequently is none of the chairmaker's business. Just imagine if the chairmaker had an interest in all subsequent uses of their chairs post sale. The economy would be unworkable.
- 9.5 Equally, it is sufficient if open commercialisation provides a sufficient benefit to citizens in order to justify its release. None of that benefit is diminished if a third party also receives a benefit from the release. The bureaucracy required to police a restriction on third parties will overshadow the benefits of open commercialisation. Moreover, restricting third parties from access to content also necessarily restricts them from contributing to the content – an opportunity cost to citizens. Being concerned about the benefits to “unrelated” third parties



from open commercialisation is not only irrelevant, it is harmfully short sighted.

## **10. Release Early**

- 10.1 Full engagement with the FLOSS community will be better achieved if Government refactors its processes for the production of PSI. Making a substantial up front commitment in ensuring the PSI is perfect or near perfect prior to release presents the community with a *fait accompli* upon that release. This does not foster any sense of involvement with potential community participants (and will therefore suppress participation). Government will need to come to terms with a process by which PSI is released earlier in its development cycle if it wants to reap the benefits of community involvement.

## **11. Other Evidence to Show the Benefit of Open Commercialisation to PSI**

- 11.1 The obvious example of the benefits of open commercialisation of public sector information is to consider what the status would be if every use of data from the Bureau of Meteorology was charged for. This would:
- (a) impose substantial transaction costs on all use of weather information;
  - (b) render most citizens criminals (for using the information without paying);
  - (c) create uncertainty in the scope of use, causing users to confine their uses to those clearly within the licence; and
  - (d) depress (out of fear of being sued) the activities of legitimate businesses using the weather information.
- 11.2 The open commercialisation of weather information has had profound and wideranging benefits to the Australian economy and to the safety of the community. There is no reason to suspect open commercialisation of other PSI will not have qualitatively similar outcomes (albeit perhaps on more localised scales).

## **Observations on Questions in Section C-3 “Developing Australia's Knowledge and Skills Base”**

### **12. Skills should not be Vendor Specific**

- 12.1 OSIA believes that ICT related skills should be treated as skills in a technology, rather than skills in a specific product. Too often ICT courses, especially for office applications, devolve into an exploration of one vendor's application, rather than of the concepts underlying the application. When students emerge from their study they are effectively locked into the vendor's product and potentially, their platform.

## **Observations on Questions in Section C-4 “Ensuring Australia's Regulatory Framework Enables the Digital Economy”**

- 12.2 OSIA would rate the current regulatory framework as a resounding success for the entrenched industries of twenty years ago and for limiting the internet economy to the pre-digital sales and distribution model designed for such industries. We would fail it in relation to promoting a Digital Economy. We would fail it on the following criteria, which we discuss below:



- (a) copyright risks are too extreme and are unable to be sensibly managed by SMEs;
- (b) complete absence of effective rights of interoperability;
- (c) a legislative regime which excuses anti-competitive behaviour;
- (d) a legislative regime which punishes, rather than rewards, sharing and innovation.

12.3 By way of example, the rproxy open source project, a world changing Australian invention, has already been destroyed by the existing regime. In early trials rproxy promised to reduce web traffic by 85%, but was closed down primarily because of infringement risks.<sup>6</sup> Had there been sensible, balanced exceptions to infringement, Australians today could be enjoying substantially improved speeds above what they currently experience. Indeed, if the legislature acted to change the law today, the cost of a National Broadband Network would be significantly reduced overnight. Rproxy – and the consequent drastic under-utilisation of resources because of it are just one of the many unsung victims of this misguided regime.<sup>7</sup>

### **13. Extreme Risks for Copyright Infringement**

13.1 OSIA believes that there are substantial barriers to growth and innovation in the Digital Economy embedded within Australia's regulatory framework. The growth of legislation over the past twenty years has largely had the effect of protecting established industries from innovation and competition.

13.2 In particular, the risks of non compliance with the Copyright Act now far outweigh any loss to the relevant copyright holders and are disproportionate to the infringing act. Extreme copyright legislation creates extreme risks for distributors. The more sources that a distributor acquires from, the more risk of infringement. The extreme provisions in the Copyright Act create a strong incentive on distributors to acquire their material from fewer sources. This is a real risk to legitimate businesses seeking to enter the sector.

13.3 OSIA would prefer for the Copyright Act to be drafted to prefer the interests of Australian SMEs such as OSIA's members. For example, the foreign music industry has spent the last decade seeking the implementation of DRM in legislation only to abandon it as a business model wholesale over the past 12 months. It is, of course, no small irony that the sale of non-DRM music has been a runaway success – if only this path had been taken 10 years ago. By acceding to the lobbying of these groups for changes to the copyright law, the legislature encouraged them to invest in a dead end business model for 10 years to the detriment of themselves and consumers. It has not only hurt the economy, it has hurt the groups it was supposed to help. The knee jerk approach to “expanding” the “rights” in the Copyright Act over the past 15 years has been a mistake.

13.4 Australian SMEs are collateral damage of these anti-competitive provisions which are now stuck in the legislation. OSIA's members in particular have trouble interoperating with technologies such as the iPod solely because of this legislation. This has a substantial impact on the marketability of OSIA members' products.

13.5 OSIA members have no interest in infringing copyright and would not do so intentionally.

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<sup>6</sup> More details are available here: <http://ozlabs.org/~rusty/rproxy.html>

<sup>7</sup> It is a great irony that recently the US Supreme Court has invalidated a broad swathe of software related patents.



However, they regularly distribute media containing literally thousands of individual<sup>8</sup> software products. A substantial component of the business value provided by OSIA members to their customers is in aggregating, and integrating many different components. The Copyright Act now has extreme risks for each of them if any one of those software products is infringing. The software products they are distributing are under constant innovation by multiple contributors. It would be completely untenable to require each of our members to conduct an individual review of every software product they were distributing.<sup>9</sup>

- 13.6 The Copyright Act does not need tinkering at the edges with the (cumbersome and biased) safe haven provisions. It needs wholesale revision to establish a blanket exemption to damages, accounts of profits and criminal liability for *bona fide* distributions. Such an exemption needs to be in terms so clear that an SME can comply without the benefit of thousands of dollars of legal advice. What would constitute a bona fide distribution could be determined by a code of conduct determined by the distributing industry.

#### **14. No rights to interoperate**

- 14.1 Currently the Copyright Act provides any person wishing to exclude a competitor from interoperating a means to do legally exclude them. By engineering any interface to rely on copyrighted information (this is a trivial exercise), it would be an infringement to implement an interface. The Copyright Act includes an exception to infringement<sup>10</sup> for reproductions for the purpose of *discovering* interoperability information. It does *not* provide an exception to infringement *for any subsequent use of that information*. The interoperability provisions in the Act are just so many dead letters.

- 14.2 There should be a clear exemption for interoperability in the Copyright Act.

#### **15. Legislation Excuses Anti-competitive Behaviour**

- 15.1 The structure of the Copyright and Patent Acts (and similar legislation) and the decision of parliament to exclude much of the exercise of entitlements under these Acts from the purview of the Trade Practices Act has rendered competition policy irrelevant to the future of at least the technology sector of the economy – and through it, any sector of the economy which can be structured so as to be reliant on technology. In our view, over the medium term this will encompass the majority of the economy.
- 15.2 As recently as two decades ago it would have been anathema to allow vendors to have legal control of aftermarkets for their products. Legislative changes in that time have reversed that, with the legislature practically endorsing such practices (eg: technological protection measure legislation).
- 15.3 The patent system for software is broken. Not only is it prohibitively expensive for an SME to conduct any sort of patent search, such searches are by their nature inconclusive. Patents which are found may be invalid because of prior art, or the search may fail to identify patents which read against the SME's product or service. If patent searching is prohibitively

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8 Predominantly this software has been openly commercialised.

9 As an example, the popular “Debian” system includes over 8,000 different components. For just one of those components, (the Linux kernel), there are over 500 copyright holders (the Linux kernel probably has substantially more copyright holders than the average component). It is simply not feasible to conduct a rigorous check of copyright holdings for each component of a system.

10 In section 47D.



expensive, patent litigation is at least three orders of magnitude more so. Patenting of inventions is an additional burden (roughly AU\$20,000 per patent per jurisdiction of coverage) which must be borne by SMEs – particularly those wishing to raise investor capital. In most cases this is a wasteful allocation of resources.

- 15.4 The patent system creates a general preference in favour of larger (and therefore likely foreign) companies who are able to either defend a patent claim, or are able to play the patent licence game. Any commercial activity by any SME is currently likely at the pleasure of at least one unidentified patent holder.

## **16. Sharing and Innovation**

- 16.1 Rather than having legislation which establishes clear rights to share and innovate, the legislation manages it by prohibiting these practices, subject to exceptions. As a consequence there are no clear rights to support sharing and innovation. Rather, these are practices which are fraught with risk. The main victims of this risk are the legitimate businesses who have something to lose and who, as a result, self limit the things that they would otherwise do in the economy.

## **17. Conclusion**

Please contact me if you would like clarification on any issues identified above.

Yours faithfully,

[by email 25 February 2009]

Brendan Scott,  
Director  
Open Source Industry Australia Limited