

# **SUPPORTERS OF INTEROPERABLE SYSTEMS IN AUSTRALIA (SISA)**

## **FIRST SUBMISSION TO**

### **INTELLECTUAL PROPERTY & COMPETITION REVIEW (IPCR) COMMITTEE**

**December 1999**

#### **General**

1. SISA is pleased to make this submission to the IPCR Committee in relation to its review of Australian intellectual property (IP) laws.
2. SISA is an IT industry alliance which supports open systems and interoperability. Accordingly, SISA has a strong interest in the development of balanced IP laws, especially copyright law. In SISA's submission, balanced IP laws are critical to innovation and competition in the IT industries.
3. SISA strongly supports the current review of the impact of IP laws on competition. Through the grant of exclusive or monopoly rights, IP laws provide an incentive for the creation of many new information and technology products. However, those exclusive rights also restrict the extent to which other businesses are free to enter the markets for the same or related products, thus reducing the level of competition in those markets. It is important that IP laws strike the right balance between incentive and competition in this context. If the scope of IP protection is too broad or too strong, and its adverse effects on competition too great, the net effect on the public interest will be negative.
4. Australia's copyright law strives to achieve a balance between protection, access and competition in a number of ways:
  - (a) protection is only available to specific categories of copyright subject matter (ie works, films, sound recordings, published editions, and broadcasts);
  - (b) overlaps with other areas of IP are avoided by protecting the form of expression, but not underlying ideas or functions;
  - (c) the scope of exclusive (monopoly) rights is limited;
  - (d) the duration of copyright protection is limited;
  - (e) the law provides for a number of 'free use' exceptions or defences (including fair dealing and some new IT-specific exceptions);
  - (f) the law also provides for a number of compulsory (statutory) licensing schemes, which are generally overseen by an independent Tribunal.

5. SISA supports the use of competition criteria as a factor in determining the scope of IP protection. Given the potential impact on competition, all proposals to amend the Copyright Act should be considered from a competition perspective, perhaps by formal referral to the ACCC for a cost-benefit analysis. If an amendment would (potentially) have a negative effect on competition or consumer interests, it should only proceed where the claimed positive effects outweigh those negative effects.

### **Computer Software Protection**

6. It is now well established by international treaty that computer programs are protected as literary works under copyright law. Although some have criticised the application of copyright law to functional products such as computer programs, SISA is not aware of any serious efforts to change this position.
7. SISA strongly supports the amendments in the Copyright Amendment (Computer Programs) Act 1999 (CACPA). The CACPA changes will have a clear positive effect on competition in the IT industry.
8. The CACPA introduces a number of new exceptions to infringement that make it lawful to make copies of computer programs in the course of:
  - (a) developing interoperable products;
  - (b) correcting bugs or errors; and
  - (c) conducting security testing.
9. Now that an interoperability exception applies under Australian law, dominant players in the IT industry can no longer use their copyright protection as a tool for preventing access to critical interface specifications. Those specifications, which are purely functional and generally do not form part of the protected expression of a program, represent the information which developers need to make new IT products that work with existing IT products (both software and hardware). Without the right to reverse engineer this interface information independently (through processes such as decompilation and disassembly), developers would be forced to rely on the information provided to them voluntarily by other vendors. If a developer is a competitor of another vendor (or is perceived as such), there is no guarantee that any or all relevant interface information will be made available. The new exceptions ensure that denial of access to interface information can no longer be used as a tool to restrict competition.
10. Importantly, the new exceptions do not undermine the protection that copyright owners have against software 'pirates'. Any person who copies protected parts of a program into a new program, or who uses the information they gain for purposes other than interoperability, will not be able to rely on the exceptions. In any case, most 'pirates' simply make multiple copies of the object code

version of a program, and have no interest in decompilation and other forms of reverse engineering.

11. The amendments make it easier for small, innovative companies to make IT products that work smoothly and effectively with the products of other (usually larger) companies. The CACPA is a perfect example of how competition goals can be achieved through the fine-tuning of the scope of IP protection.

### **Digital Agenda Issues**

12. A possible threat to the current balance under the Copyright Act comes in the form of the new anti-circumvention laws set out in the Digital Agenda Bill.
13. Under the new provisions, it will become unlawful to make or deal in most 'circumvention devices'. Thus, as copyright owners move to 'lock' their content with encryption technologies, users will have no access to the technologies that would allow them to circumvent those locks. This approach assumes that circumvention of those locks is always a bad thing. However, many people (including independent IT developers) will need to circumvent technological locks in order to gain lawful access to unprotected information or content (eg interface information). If they cannot get hold of appropriate devices, this access will not be possible. Thus, SISA strongly supports provisions in the Digital Agenda Bill that will permit the making or dealing in circumvention devices where it is done for permitted, non-infringing purposes. In particular, SISA strongly supports the inclusion of the CACPA exceptions within the list of 'permitted purposes' under the Digital Agenda Bill.

### **ADA submission**

14. SISA is a member of the Australian Digital Alliance, and supports the earlier submission of the ADA to the IPCR Committee.

### **Contact**

15. SISA welcomes the opportunity to participate further in any discussions or consultations with the IPCR Committee. If you have any questions, please contact:

Jamie Wodetzki  
jamie.wodetzki@minters.com.au  
wodetzki@zip.com.au