

13 April 2004

Committee Secretary
Joint Standing Committee on Treaties
Department of House of Representatives
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Dear Secretary

***Submission to the Joint Standing Committee on Treaties
Inquiry into the Australia - United States, Free Trade Agreement***

Thank you for providing us with an opportunity to make a submission in relation to this inquiry.

The implementation of the Free Trade Agreement with enhanced IP arrangements will provide a stronger legal framework for the industry and enhance and strengthen the dynamic trading environment between Australia and the United States.

The Australian market for computer and video games is expanding rapidly with sales of consoles, games and peripherals in 2003 is estimated to be \$796 million. However, the single most significant threat to the growth of the industry is the counterfeiting and piracy of interactive games. As well as "traditional" piracy, the growth in the market of online gaming means internet piracy is now a serious and growing problem for the interactive entertainment industry.

As we see it, the Australia-US Free Trade Agreement provides the framework for Australia to implement transparent and consistent legal provisions and enforcement procedures that includes ISP liability for copyright infringement.

The Interactive Entertainment Association of Australia (IEAA) is a not-for-profit trade association for the Interactive Entertainment Industry and represents Australian companies that are responsible for the sales, marketing, distribution and development of computer and video games software, hardware and accessories.

Members of IEAA are Acclaim Entertainment, Activision, Atari Australia, Eidos Interactive, Electronic Arts, Microsoft, Mindscape Asia Pacific, Nintendo Australia, Sony Computer Entertainment, Take 2 Interactive, THQ, Ubi Soft and Vivendi Universal Games.

IEAA has active links with like Associations in America, UK and Europe and locally with the Game Developers Association of Australia.

IEAA would be happy to meet with the committee at their convenience to discuss this submission further.

Yours faithfully



Beverly Jenkin
Chief Executive Officer

IEAA SUBMISSION TO PARLIAMENTARY FTA INQUIRIES

INTRODUCTION

The Interactive Entertainment Association of Australia (IEAA) is the Australian not-for-profit trade association dedicated to serving the business and public affairs needs of companies that are responsible for sales, marketing, distribution and development of computer and video games software, hardware and accessories.

In summary copyright and protection of intellectual property rights are vital to IEAA members. Australian law and the priority given to copyright enforcement have been allowed to slide to levels unacceptably below those of the European Union and the United States. This is having two unfortunate consequences for the computer and video games industry.

First, the penetration of online gaming is being impeded because the absence of ISP liability provides distributors with little protection; hence Australian consumers are not gaining access to the latest form of games distribution as readily as their counterparts elsewhere in the developed world, meanwhile developers are not investing as much into the local production of online games as the market does not justify such investment.

Second, the cost of piracy and counterfeiting of computer and video games is likely to continue to grow in the absence of the introduction of the measures contained in the AUSFTA Intellectual Property Chapter. The Allen Consulting Group estimated those costs to the interactive entertainment industry for 2002 to be \$100 million in lost sales and \$21.8 million in lost profits.

BACKGROUND

Although interactive entertainment is a relatively new phenomenon it is growing fast. The total market value of interactive entertainment in Australia has increased by 43.5% between 2001 and 2003.

In 2003 the total value of the Australian interactive entertainment market was estimated to be \$796 million with \$462 million representing games software and \$334 million for console hardware and peripherals. This represents a spend by Australians of \$2.05 million per day or \$100 per household per year.

Many Australians are surprised that the age profile of gamers is not as young as they expect. People who started playing computer games 10 to 15 years ago still enjoy the interactive medium. They appreciate the growing sophistication and evolution of modern technology and can afford to pay \$100 per game. The age break down of those who play computer games is 30% under 18, 50% 18-39 and 20% over 39.

In terms of both consumers and games development, Australia is a global player. There is increasing international recognition of the Australian interactive games industry as being sophisticated, dynamic and at the forefront of technology. Employment in Australia's interactive games industry is growing, as is local and international investment, however, IEAA believes the growth of the industry could be stronger with a stronger intellectual property protection regime.

ECONOMIC AND CONSUMER BENEFITS OF REDUCING COPYRIGHT COUNTERFEITING

In 2003 the IEAA joined with the Australian Toy Association and the Business Software Association of Australia to commission The Allen Consulting Group to conduct research into the effect of counterfeiting on the industries as well as consumers and Government.

The major finding was that in 2002 counterfeiting resulted in \$667 million in lost sales, of which \$100 million was attributable to the computer and video games industry. The report stated:

“Costs of counterfeiting are also borne by the economy which loses tax revenue because counterfeiters tend to operate outside the tax net; and consumers who may be deceived into buying non-original and/or inferior goods and who are often disappointed when they realise that they have non-genuine products and try to seek redress with the vendor, or are at serious health or safety risk with counterfeit toys.”

The Allen Consulting Group report went on to assess the benefits that would accrue from a reduction of counterfeiting in the three industries over five years. This reduction would bring Australia into a comparable position with New Zealand and the United States:

- Increase in real gross domestic product by around \$41 million per year
- Increase in Government tax revenue of \$34.4 million per year
- Generation of more than 400 full and part time jobs.

IEAA INTELLECTUAL PROPERTY PRIORITIES

During the Aus/US FTA consultation process IEAA sought the following improvements for the interactive entertainment industry regarding the protection of intellectual property rights to ensure adequate protection for Australian interactive games developers and publishers:

1. Whole of Government response to the counterfeiting and piracy of interactive games;
2. Expansion in effective enforcement against the counterfeiting and piracy of interactive games, specifically –
 - a. Improved presumptions relating to copyright subsistence and ownership,
 - b. Proof of knowledge amendments in relation to importation and dealing in infringing copies,
 - c. Higher penalties for computer games piracy;
3. Legal protection for technological measures to be strengthened;
4. Internet Service Providers and copyright as far as;
 - a. Narrowing the provisions that limit ISP liability for copyright infringement; and
 - b. Implementation of measures designed to require ISPs to take positive action in response to notices of copyright infringement through mandatory code of practice or legislation;
5. Protection for temporary copies clearly providing that the exclusive rights of reproduction extends to both permanent and temporary copying; and
6. Support for the temporary transfer of personnel to enhance and update practical experience and technological skills.

WHAT WAS AGREED IN THE AUS-US FTA

IEAA agrees with, and has long been arguing for, the need for enhanced intellectual property enforcement, including agreed criminal standards for copyright infringement and on remedies and penalties, as discussed in the IP Chapter.

IEAA is pleased with the Key Points negotiated between Australia and the US in the IP Chapter; however it is not clear in all cases that the specific requirements of IEAA, above, will be translated into legislation.

The first key point in the IP Chapter, “Stronger protection for copyright owners” is of the utmost importance to IEAA; however, consideration to legislation does raise some questions as to the implementation of the Agreement.

To address each point:

- IEAA supports the agreement to implement the WIPO Internet Treaties upon entry into the FTA;
- An expeditious process that allows for copyright owners to engage with ISPs and subscribers to deal with allegedly infringing copyright material on the Internet. IEAA believes this point is fundamental to ensuring strengthened protection for the industry; however, "expeditious process" needs to be clearly defined and include liability on the part of ISPs, particularly in the instances of repeat offences.
- IEAA believes there is an urgent need for tighter controls on circumventing technological protection of copyright material, however is concerned at the addition of "as necessary introducing public interest exceptions in relation to technological protection measures". Depending on the definition of those "exceptions" by including this mechanism, the Government may provide a loop-hole for IP thieves to avoid prosecution. IEAA acknowledges that there would be a transition period to allow the opportunity for public submissions in this area, and will actively participate in those consultations.

On the whole, the IEAA believes that with carefully drafted legislation, the FTA will strengthen the Australian IP regime allowing economic growth through trade and investment through increased confidence in the protection of copyright and the industry as a whole.

WHY THESE MEASURES WILL BENEFIT AUSTRALIAN INDUSTRY AND CONSUMERS

According to industry analyst IDC in its recent report "From Den to Digital Home", it is indisputable that take up of online games speeds the penetration of broadband internet, which the Government regards as a desirable objective for the promotion of e-commerce and e-business (attached article "Pick a Box"- the Australian, 30 March 2004). At present, business plans to deliver competitively priced product to consumers online is being inhibited by the lack of ISP liability in Australia.

This has resulted in many ISPs in Australia refusing to take any action in response to notices of infringing activity carried on by subscribers. In the US, where ISP liability exists, the Entertainment Software Association (sister association to the IEAA) has an established notice and takedown program to deal with internet piracy. The average rate of compliance by Australian ISPs with the takedown notices sent out by the ESA of the past two years has been less than 20 per cent. This is a poor compliance rate and can be contrasted with an average compliance rate of between 60 to 80 per cent depending on protocol among US ISPs.

Increased copyright enforcement mechanisms, including ISP liability and increased criminal and civil protection will both deter potential copyright thieves and raise confidence in the industry encouraging economic investment and growth in the local industry. It was estimated in The Allen Consulting Group report that a reduction in counterfeiting and copyright infringements of just one third would provide an increase of up to 400 full and part time jobs providing further benefit to the community and the local industry. Increased investment in the industry would also assist to prevent the "brain drain" of Australian talent away from our shores and into the international market in the longer term.

CONCLUSION

| The IEAA urges the Committee to recommend adoption of the IP Chapter and its speedy translation into legislation in the interests of both Australian industry and consumers. A secure online copyright regime in line with the EU and the US will benefit both consumers of interactive games and the community as a whole, by accelerating broadband penetration and encouraging further investment into the Australian industry, as will further strengthening of intellectual property laws through increased enforcement and controls.