



**SUBMISSION TO THE SENATE SELECT COMMITTEE IN
RELATION TO THE AUSTRALIA - US FREE TRADE
AGREEMENT (FTA)**

**PRESENTED BY BUSINESS SOFTWARE ASSOCIATION OF
AUSTRALIA (BSAA)**

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Introduction

The Business Software Association of Australia (BSAA) appreciates the opportunity to comment on the recently concluded Australia-US Free Trade Agreement (FTA). Our comments relate to chapter 17 which deals with intellectual property rights and in particular the copyright provisions of the FTA.

BSAA is an association of leading software companies operating in Australia including Adobe, Apple, Autodesk, Borland, Macromedia, Microsoft and Symantec. Australia prides itself on its commitment to innovation and technological advancement to which the software industry is a vital contributor. The software industry relies on intellectual property laws in order to protect the value of the considerable investment required to create new software products.

Summary

In the FTA both Australia and the US commit themselves to the highest standards of intellectual property protection. BSAA firmly endorses this objective and welcomes the intellectual property provisions of the FTA on the basis that implementation will further strengthen Australia's intellectual property regime and lead to greater harmonisation of Australia's IP laws with those of our major trading partners.

Copyright Piracy in Australia

In December 2000 the House of Representatives Standing Committee on Legal and Constitutional Affairs handed down their report "Cracking down on copycats: infringement of copyright in Australia" (Copycats Report). The Committee handed down its report following a wide ranging and comprehensive inquiry instigated by the Attorney General of Australia. The Committee made a number of key findings including:

- copyright piracy is a significant and costly burden to many Australian industries that rely on creative endeavour (paragraph 2.45);
- infringement of copyright is likely to increase in the future and a large proportion of infringement is likely to occur through the internet (paragraph 2.45). This prediction of the Committee has certainly proved correct because internet piracy has become a significant issue for the copyright industries.

In the light of its findings, the Committee made a large number of recommendations designed to improve the regime for enforcement of copyright in Australia. A number of these recommendations have not yet been implemented.

The fact that copyright piracy remains a serious problem in Australia is illustrated by a November 2003 report by the Allen Consulting Group entitled "Counterfeiting of toys, business software and computer and video games". The Allens Consulting Group study found that in 2002 counterfeiting in these industries in Australia resulted in \$677 million of lost sales, representing \$200 million in lost profits. The study estimated that a 1/3 reduction in counterfeiting would result in a substantial increase in real gross domestic product - in net present value terms A\$466.3 million benefit to the Australian economy and an increase in tax revenues representing a benefit of A\$487.2 million in net present value terms.

BSAA therefore believes that any measures designed to bolster copyright protection and assist in the fight against copyright piracy will be of benefit to Australia.

Key copyright provisions

We comment below on a number of key copyright provisions in the FTA which BSAA supports on the basis that they will assist in strengthening the regime for copyright enforcement in Australia and in harmonising Australia's copyright laws with those of other leading countries.

Enforcement Provisions

The FTA contains a number of provisions designed to assist in enforcement against copyright piracy. These include:

- The requirement for criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale (Article 17.11.26). It is recognised in all countries that criminal sanctions are needed to provide a deterrent against piracy.
- The requirement for presumptions to assist in proving subsistence and ownership of copyright (Article 17.11.4). The current onerous requirements for proof of subsistence and ownership of copyright have proved a major obstacle to bring in criminal proceedings.
- The requirement to establish either a system of pre-established or statutory damages or a system of additional damages to serve as a deterrent against copyright piracy (Article 17.11.7).

BSAA supports these provisions and notes that they were all recommended by the Copycats Report.

Technological Protection Measures - Anti-circumvention (Article 17.4.7)

Strong anti-circumvention provisions will become increasingly important as copyright owners in the digital environment rely on technological protection measures to protect their works and reduce piracy. Article 17.4.7 contains a number of provisions designed to enhance enforcement against circumvention of technological protection measures. These provisions will also bring Australia's anti-circumvention laws into line with those of the US and EU.

ISP Liability (Article 17.11.29)

Article 17.11.29 introduces a number of provisions designed to assist in enforcement against internet piracy. The key feature is setting up a notice and takedown regime whereby copyright owners can give notice to ISPs of infringing material residing on websites hosted by them. In exchange for taking action to remove infringing content, ISPs are exempted from all claims for monetary relief. This will achieve far greater certainty for both copyright owners and ISPs than the current regime in Australia under which ISPs may be liable under the doctrine of authorisation liability but there is no certainty as to what steps they must take in response to a claim that a website hosted by them contains infringing material. A similar notice and takedown regime has

worked extremely well in the US since 1998. We should however point out that additional measures will be needed in both Australia and the US to deal with the more recent and growing phenomenon of peer to peer file sharing which allows internet users to illegally distribute vast quantities of copyright music, film and software.

Extension of Term of Copyright (Article 17.4.4)

Article 17.4.4 requires Australia to extend its term of copyright protection by an extra 20 years from life of the author plus 50 years to life plus 70 years and, in the case of sound recordings and films from the current 50 year term to 70 years after publication. This issue was comprehensively reviewed by the Allens Consulting Group in a July 2003 report entitled "Copyright Term Extension - Australian Benefits and Costs". The authors of the report found that overall the net financial impact of copyright term extension was likely to be neutral but suggested two key arguments in favour of Australia extending the term of protection. These were:

- (a) the need to counter balance the increased risk proposed by piracy and the losses which it causes; and
- (b) the benefits of harmonisation with our major copyright trading partners including the US and Europe which have both introduced 70 year terms.

Conclusion

BSAA therefore supports the copyright provisions of the FTA and believes that their implementation will provide considerable benefits for Australia.

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