

Dear Secretary,

Please find following a submission in respect of the Australia-United States of America Free Trade Agreement, agreed at Washington on 8 February 2004 (FTA), the current reference of the Senate Select Committee in respect of that Agreement.

I am writing as an official representative of Cybersource Pty Ltd. Our address and contact details follow the body of our submission.

Cybersource Pty Ltd is a fully Australian owned IT consulting business with approximately 50 employees (full and part time). We are deeply concerned about the likely impact of the proposed FTA on our business.

Between 80% and 90% of our business is related to the Free and Open Source Software (FOSS) industry. We believe that the proposed FTA will have a major negative impact on the FOSS industry and the availability of FOSS for consumers.

FOSS is one of the fastest growing industries in the IT business at the moment. Approximately 70% of the Internet runs on FOSS. The FOSS business model encourages collaborative development and distribution of software, and greatly lowers the barriers to entry for both IT businesses such as ourselves, and consumers who wish to purchase and make use of computer software.

By making the source code, or program internal workings, available, FOSS levels the playing field and lowers barriers to competition. As a small business, we estimate that without FOSS our IT running costs could be conservatively 500% higher and our ability to do business severely damaged.

The FOSS industry began in the USA in the early 1980s. Over the last four or five years, we have watched as the centre of excellence in the FOSS industry has gradually moved from the USA to Asia and Europe, especially Germany and France. For example, the governments of China, Japan and South Korea have recently agreed to co-operate on developing the next generation of computer Operating System as a replacement for Microsoft Windows, based entirely on FOSS.

See the following for more information:
http://english.peopledaily.com.cn/200404/05/eng20040405_139504.shtml

Australia is uniquely situated to take advantage of that shift, as we can bridge the gap between Asia and the West. Australia already punches above its weight in the FOSS industry. IBM has recently doubled the size of its Linux kernel development team in Canberra.

Amongst other software, the award-winning SAMBA software, which allows millions of people to access Linux computer servers from their Windows PCs, is Australian-made. SAMBA is best-of-breed software, and could

easily be at risk under proposed changes to Australian law demanded by the USA Government as part of the FTA.

That strategic advantage held by Australia is in danger under the proposed FTA. We believe that the harmful effects of US patent law and the DMCA on the software industry in general and the FOSS industry in particular are already visible in the USA.

The proposed FTA would bind the Australian Government to change our laws to restrictive and anti-competitive legislation that benefit only entrenched corporations. By allowing software patents, the proposed FTA will encourage monopolies and discourage competition. Rather than leveling the playing field, the proposed FTA will make it much harder for small and medium businesses such as ourselves to compete against larger American corporations such as Microsoft.

Cybersource develops software for sale. We oppose the granting of software patents. We are not alone in this. Many other software producers do as well, including the world's second largest software corporation, Oracle Corporation. The European Union recently voted against software patents.

Hartmut Pilch, president of FFII and speaker of the Eurolinux Alliance, has said:

"All the economic studies we know of, including those ordered by the European Commission and by member state governments, have shown that software patents are only of very secondary importance as a means of securing investment in research and development. ... In fact, according to the most detailed economic studies, patent investments in the United States have actually tended to reduce spending and divert it away from R&D investment in this sector. These points came out particularly clearly in the testimony given by directors of large companies to the US Federal Trade Commission at governmental hearings in the USA last year".

Source: <http://lwn.net/Articles/79930/>

It is our position that introducing American-style software patents to Australia will seriously jeopardize Australia's software industry. Software patents are an anti-competitive legal barrier that tilts the playing field in favour of large incumbents and reduce, not increase, innovation.

We believe that existing copyright law is sufficient to protect software developers, indeed the FOSS industry relies on strong copyright protection. However software patents go much further than copyright, and the effect in the USA has been to reduce competition, increase business costs and uncertainty, and severely reduce software innovation.

Under the proposed FTA, the Australian Government is forced to introduce American-style laws, including software patents. Those laws will weaken Australia's competitive advantage, although they will be good for the Intellectual Property lawyers.

The proposed FTA will potentially affect large numbers of people who don't even consider themselves to be software developers. In the USA, computer researchers have been threatened with prosecution under the DMCA for performing legitimate research into computer security.

The website www.chillingeffects.org documents some of the ways that the DMCA has had a negative effect on legitimate business and scientific research and free speech.

In an example of how the DMCA has been used to stifle competition in ways which was never intended, the DMCA has been used by printer manufacturers such as Lexmark to attempt to prevent competitors from manufacturing compatible cartridges.

We fear that strengthening our already-tough Digital Agenda Bill to the level of the American DMCA will have an equally chilling effect on competition.

Under the proposed FTA, the balance of Australian law will be seriously shifted. Few Australians would consider making an unauthorised copy of a music CD to play in the car to be worse than stealing a CD from a store, but under Article 17.7(a) the statutory entitlement to damages for copyright infringement is established at greater than the actual loss.

Infringements for which there are no direct or indirect financial benefit to the infringer are considered to be on a commercial scale, exposing the citizen to substantial liability for trivial infringements.

In summary, it is our position that the proposed FTA will severely reduce the ability of Australian software developers to compete with American firms, and prevent Australia from taking part of the ever-growing FOSS industry. It will hurt Australian businesses that rely on FOSS, and negatively impact Australian individuals who develop software as a hobby or as a business. Furthermore it threatens to be anti-competitive and tilt the playing field even further to the advantage of large American corporations and against small businesses such as ourselves.

I thank you for your time.

Yours sincerely,

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Steven D'Aprano
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