



January 21, 2003

Trade Policy Staff Committee  
Office of the U.S. Trade Representative  
600 17th Street, N.W.  
Washington, DC 20508  
Attention: Gloria Blue, Executive Secretary

Re: U.S. – Australia Free Trade Agreement -- BSA Response to  
Request for Written Comments, 67 Fed. Reg. 76,431 (Dec. 12, 2002)

Dear Trade Policy Staff Committee:

The Business Software Alliance appreciates the opportunity to comment on the proposed U.S. - Australia Free Trade Agreement (FTA) in response to the above-referenced Federal Register notice. Our comments relate to U.S. negotiating objectives in the areas of trade-related intellectual property rights, electronic commerce, trade in services, trade in goods and government procurement.

As a representative of the leading software and computer companies in the United States, BSA supports the United States' efforts to liberalize trade around the world through multilateral, regional and bilateral negotiations. BSA member companies are very active in Australia, and look to these FTA negotiations to ensure that Australia (i) implements and enforces the highest standards of intellectual property protection, (ii) preserves a liberal trading environment for electronic commerce and digital products in particular, (iii) commits to provide full market access and national treatment across a broad range of service sectors necessary for e-commerce, and (iv) ensures duty-free access for high technology products.

### **Intellectual Property Rights**

Consistent with the negotiating objectives set forth in the Trade Promotion Authority Act, BSA seeks to ensure that the U.S. – Australia FTA promotes the adequate and effective protection of intellectual property rights. Its substantive standards of protection should reflect current and future technological developments and its enforcement provisions should ensure that Australia provides “accessible, expeditious and effective civil, administrative, and criminal enforcement mechanisms.” *Bipartisan Trade Promotion Authority Act of 2002*, 19 U.S.C. § 3802(b)(4) (2002).

The U.S. – Australia FTA should follow the high standards of intellectual property protection that we understand have been achieved in the U.S. - Singapore FTA. As the United States pursues its policy of “competitive liberalization,” all our FTA partners should be held to the same high standards. Each FTA should address specific problems in the bilateral trade relationship, but each should also reflect a common baseline level of protection.

### **The Intellectual Property Environment**

According to the studies conducted by International Planning and Research Corporation, the average piracy rates in Australia for business software for the years 1996 to 2001 were:

1996	1997	1998	1999	2000	2001
32%	32%	33%	32%	33%	27%

Piracy rates were and continue to be even higher in some segments of the software market in Australia. For example, according to a study conducted by Carma International in July 1998, the piracy rate in the graphic design sector was 66% and the rate in the computer aided design sector was 48%.

While there was a welcome reduction in the general software piracy rate in 2001, business software piracy still remains a serious problem in Australia, particularly in the graphic design and computer aided design sectors that make extensive use of sophisticated software. The retail value of losses (US\$000s) caused by business software piracy in Australia during the 1996-2001 period was:

1996	1997	1998	1999	2000	2001
\$128,267	\$129,414	\$192,237	\$150,390	\$132,533	\$91,011

There are a number of serious deficiencies in the regime for enforcement of intellectual property rights in Australia. These deficiencies were recognized in a 2000 report of the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs entitled "Cracking down on copycats: enforcement of copyright in Australia". The Committee made a number of key findings, including that copyright piracy is a significant and costly burden to many Australian industries that rely on creative endeavor. In light of its findings, the Committee made a large number of recommendations designed to improve the regime for enforcement of copyright in Australia. The Australian Government has never responded to the Committee's report.

**Specific deficiencies in the Australian legal and enforcement regime include the following:**

- **Reproduction right - inadequate protection for temporary copies:** BSA is very concerned that Australian copyright law does not give copyright owners sufficient protection against temporary copying of their works. The law does not contain any explicit provisions to the effect that the exclusive right of reproduction extends to temporary copying. Two recent cases have cast doubt on the extent to which Australian copyright law gives copyright owners the right to control temporary copying.<sup>1</sup> Secondly, the law contains an explicit exception for temporary reproduction of a work made as part of the technical process of making or receiving a communication. (Section 43A(1) of the Copyright Act.) This broad exception creates a significant loophole that greatly diminishes the protection available to right holders.

The right of exclusive control over reproduction of a work lies at the core of copyright law. In the internet age it is vital for copyright owners to be given control over the making of both permanent and temporary copies. This is so because in the online environment quite often the only copies of work made are temporary ones. Given the huge problem posed by internet

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<sup>1</sup> *Australian Video Retailers Association Limited & Ors v Warner Home Video Pty Limited & Ors*, 53 IPR 242, (addressing temporary copying of a computer program in the course of playing a DVD disc); *Kabushiki Kaisha Sony Computer Entertainment & Ors v Stevens* 55 IPR 497 (addressing temporary copying of a computer program in the course of playing a Sony PlayStation game).

piracy and the growth in online distribution of computer programs, the need for copyright owners to control temporary copying is of fundamental importance.

- ***Inadequate protection against circumvention of TPMs:*** Australia has enacted legislation which purports to provide protection against circumvention of technological protection measures as required by the WIPO Copyright Treaty. However, these measures do not provide adequate protection. BSA has three main areas of concern.
  - First, the Australian Copyright Act does not contain any prohibition on the act of circumventing a technological protection measure (it only prohibits manufacture and commercial dealings in circumvention devices). This is a serious gap in protection for copyright owners and is contrary to the requirements of Article 11 of the WIPO Copyright Treaty. Both the US Digital Millennium Copyright Act and the European directive on copyright contain provisions which prohibit the circumvention of technological protection measures.
  - Secondly, the Act contains exceptions which allow the manufacture and dealing in circumvention devices if the circumvention device is to be used for a “permitted purpose”. The permitted purposes exception is very broad and creates a loophole which could easily be exploited by a pirate dealing in the circumvention devices.
  - Thirdly, BSA is concerned about a recent decision, *Sony v. Stevens*<sup>2</sup>, in which it was held that the supply by a pirate of “mod chips” designed to allow pirated games to be played on Sony PlayStation consoles was *not* in breach of the Australian anti-circumvention provisions. This exposes a serious deficiency in the anti-circumvention provisions in the Australian Copyright Act because the conduct in that case was precisely the type of circumvention activity which should be prohibited under any anti-circumvention legislation as mandated by the WCT.
- ***Onerous requirements for proving ownership of copyright:*** A major procedural deficiency in the Australian enforcement system is the onerous procedural requirements for proving ownership of copyright in criminal cases. The presumptions that apply are insufficient, and thus right holders are frequently put to the complex and expensive task of proving ownership.

Under section 134A of the Copyright Act, evidence of ownership of copyright in a criminal prosecution may be given by affidavit. The task of preparing an admissible affidavit, however, is extremely costly and time consuming, particularly in the case of a typical computer program that has been written by a large number of programmers over a period of years. For example, there were at least 400 people involved on the development team for Microsoft Windows 95, itself an evolution of the Windows Program which was developed over a number of years. In a typical piracy case where a large number of programs of different software publishers are involved, these difficulties are magnified.

The onerous requirements for proving ownership of copyright are particularly unwarranted given that in the vast majority of software piracy cases, the defendant does not seriously dispute ownership. A challenge to copyright ownership is raised by the defendant simply as an obstructive tactic. We are aware of a number of criminal prosecutions for copyright infringement which have foundered due to inability of the prosecution to prove ownership of copyright, despite the fact that there was no evidence disputing the copyright owner’s title.

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<sup>2</sup> *Kabushiki Kaisha Sony Computer Entertainment & Ors v Stevens* 55 IPR 497.

- ***Lack of criminal remedies for end user piracy:*** Under the Australian Copyright Act (section 132), the only criminal offences for copyright infringement consist of certain commercial dealings in infringing articles namely, making infringing articles for sale, selling or distributing infringing articles, and importing or possessing infringing articles for the purpose of sale or distribution. Australian copyright law does not provide for a criminal offence in the case of commercial end user piracy - i.e., making unlawful copies of computer programs for use within the business. Business end user piracy accounts for a very large proportion of the losses suffered by software companies in Australia.

The lack of a criminal offence deprives software companies of one of the most effective deterrents against software piracy and also places Australia in breach of Article 61 of the TRIPS Agreement. In its Report, the House of Representatives Committee recommended the introduction of an offence relating to end user piracy. The Committee found that in order to deter end user piracy, criminal sanctions must be directed at the use of infringing software and not just its manufacture, distribution or sale. In making its recommendation the Committee cited the submission of the Business Software Association of Australia to the effect that:

- (a) The US, the UK and many European countries had provisions which make end user piracy a criminal offence; and
- (b) The absence of such provision in the Copyright Act in Australia places Australia in breach of its obligations under Article 61 of the TRIPS Agreement.

The Committee also cited the 1994 report entitled “Computer Software Protection” of the Government appointed Copyright Law Review Committee (CLRC). In that report the CLRC recommended amending the Copyright Act to introduce a criminal offence for end user piracy. The Australian Government has also failed to respond to this recommendation.

- ***Inadequate civil damages - Lack of statutory damages:*** There are a number of potential problems inherent in the current regime for awarding damages in software copyright infringement suits in Australia. These are illustrated by the arguments commonly raised on behalf of defendants in such actions.

A common argument raised by defendants in infringement cases is that the copyright owner should only be allowed to recover the lost profit on its wholesale price to distributors. This approach results in a low level of damages compared to the damage caused by the infringer and the value of the software infringed, as it does not measure the full amount of damage caused by the infringer throughout the distribution chain. In addition, this approach often imposes a considerable burden on copyright owners to present complex evidence as to their overall cost structure and profit margins. As these are likely to be sensitive commercial matters, the copyright owner may be deterred from proceeding by the prospect of having to engage in complex discovery, the cost of which far outweighs the possible recovery of damages in the case.

Another common argument is raised by defendants in end user piracy cases. In these cases, the defendants often argue that licences purchased after action has been taken against the defendant should be taken into account in assessing any damages. Damages awarded under this theory obviously are nominal and ineffective as a deterrent to future infringement.

The problem of calculation of actual damages is often compounded by difficulties in establishing precisely the number of copies an infringer has actually made. Businesses that make infringing copies for internal use may have copied and used several successive versions and “upgrades” of the same product before they are caught, but only the latest version may be found on their computers. Even where the Anton Piller (search and seizure) remedy is used,

infringers can delete copies of software on the computers before the search commences and it may not be possible to prove that this has occurred. Difficulties associated with proving the extent of infringement are also present in the case of those dealing in counterfeit copies. Such infringers rarely keep business records reflecting the extent of their unauthorized copying or sales of pirated copies.

Rather than deterring infringement, these narrow interpretations of actual damages standards provide a strong financial incentive for infringers to engage in infringement. Under these theories, an infringer's costs of purchasing the software at the time it made the infringing copy would have been substantially higher than the amount of any damages awarded if they are caught and action is taken against them. The infringer is thereby encouraged to make the unauthorized copy and run the risk of enforcement, knowing that even if that risk materializes, the penalty will be negligible. Australia's lack of a deterrent level damages regime places Australia in breach of Article 41 of TRIPS.

- **Low level of criminal enforcement:** The level of criminal enforcement of software piracy in Australia is extremely low. The agency with primary responsibility for prosecuting software piracy is the Australian Federal Police (AFP). In a 1996 report entitled "Law Enforcement and IPR Protection" by the Office of Strategic Crime Assessments, it is acknowledged that intellectual property offences are likely to be accorded a relatively low priority by the AFP. This is consistent with the BSA's experience that the AFP is extremely reluctant to take on prosecutions of software piracy unless organised crime or very large quantities (value \$1 million or more) are involved.

The policy of the AFP is reflected in the very small number of criminal prosecutions for software piracy which have been brought in Australia. In the period 1991 to 2002, we are aware of only 9 cases of criminal prosecution for software piracy.

Deficiencies in criminal prosecution are especially apparent in Australia's routine failure to prosecute importers of counterfeit software. Australian Customs seizes hundreds of shipments of counterfeit products every year and yet to our knowledge there has never been a criminal prosecution brought as a result of any of these importations. The counterfeit products are merely forfeited -- and then only if the importer consents to forfeiture. If the importer does not consent to forfeiture, then the copyright owner is forced to bring expensive civil proceedings to prevent the release of counterfeit goods to the importer. This procedure has failed to serve as a deterrent to importers of counterfeit material.

- **Criminal remedies - lack of deterrent penalties in practice:** The Copyright Act in Australia (section 132) provides for penalties of up to A\$60,500 (about US\$33,000) and/or 5 years imprisonment for individuals and A\$302,500 (about US\$170,000) for corporations. However, the penalties actually imposed by the Courts in practice are very far removed from the maximum penalties and woefully inadequate to serve as a deterrent to infringement. In actual software piracy cases, the penalties imposed have ranged from a community service order to a fine/costs award of A\$9,500 (about US\$5,000). No one has ever been sent to prison in Australia for an intellectual property crime.
- **Internet service provider liability - inadequate provisions:** The Copyright Amendment (Digital Agenda) Act 2000 introduced amendments to the Australian Copyright Act that significantly reduced the liability of internet service providers and weakened the ability of copyright owners to combat the growing problem of internet piracy. Problematic provisions include the following:
  - (a) Section 39B - provides that anyone, including an ISP, who provides facilities for making a communication is not liable for copyright infringement merely because the

facilities are used to infringe. This provision is far broader than the exception contained in Article 8 of the WIPO Copyright Treaty or in U.S. copyright law;

- (b) Section 22(6) - the effect of this provision is that an ISP is not liable for infringing the communication right unless the ISP was responsible for determining the content of the communication;
- (c) Section 43A(1) - this section provides that copyright is not infringed by making a temporary reproduction of a work as part of a technical process of making or receiving a communication. This is a very broad exception which appears to exempt browsing and caching from liability in almost all circumstances. No such exemption exists in U.S. copyright law.

The law also does not contain any notice and take down provisions such as those contained in the U.S. Digital Millennium Copyright Act. In summary, Australia's ISP liability regime is heavily biased in favour of ISPs, and does not create sufficient incentive for ISPs to cooperate with copyright owners in fighting internet piracy.

### **Key Intellectual Property Provisions in the U.S. – Australia FTA**

BSA supports an Intellectual Property Rights Chapter that is forward-looking and technologically neutral, and addresses the specific deficiencies described above that have hindered copyright protection in Australia. The Chapter should be TRIPS -plus and NAFTA-plus, and should include the obligations in the WIPO Copyright Treaty (WCT), as well as effective enforcement provisions that respond to today's digital and Internet piracy realities.

**In accordance with these goals, all of the following substantive obligations should be included in the U.S. – Australia FTA Intellectual Property Rights Chapter:**

- **WCT:** Australia has not ratified the WIPO Copyright Treaty, and should be required to do so as part of this FTA.
- **Right of reproduction:** It is absolutely crucial that the FTA contain a provision mandating that the Parties provide to right holders the exclusive right to authorize or prohibit reproduction of their works, including both permanent and temporary copies, as required under the Berne Convention, the TRIPS Agreement and the WCT. We note that for Australia to comply with this obligation will require an amendment to the Australian Copyright Act; such an amendment is very important to ensure adequate protection in Australia for BSA members' products.
- **ISP liability:** The Agreement should contain balanced ISP liability provisions that reflect those in the U.S. Digital Millennium Copyright Act. Australia should be required to introduce amendments to its regime for internet service provider liability so as to bring it into line with international standards and ensure that internet service providers are given sufficient incentive to cooperate in the fight against internet piracy.
- **Technological protection measures:** A provision must be included in the FTA that tracks the WCT obligations and U.S. law on making illegal the circumvention of technological measures and that ensures that devices, services and components thereof are fully covered. Adequate and effective legal remedies, both criminal and civil, must be incorporated into the enforcement text. BSA understands that a strong TPM obligation in the FTA will require amendment of the Australian Copyright Law. Such amendments are crucial to address the overly broad exceptions and other deficiencies described above.

- **Government legalization of software:** The FTA should require that Australia issue appropriate administrative or executive decrees, laws, orders or regulations mandating that all government agencies use and procure only properly licensed computer software. Such instruments should actively regulate the acquisition and management of software for government use, including through requiring periodic inventories of software assets and licenses.
- **Right of importation :** Copyright holders should have the right to authorize or prohibit the importation of both piratical and legal copies imported without the consent of the right holder. We note that the Australian Government has introduced a bill which would remove the right of software copyright owners to prevent parallel importation of their software products.
- **Right of distribution :** Copyright holders should have the exclusive right to authorize the distribution to the public of the original and copies of their works through the sale or other transfer of ownership, as provided in Article 6 of the WCT. We note that for Australia to comply with this obligation will require an amendment to the Australian Copyright Act.
- **Prohibition on levies on digital equipment and media:** The FTA should prohibit either Party from imposing mandatory copyright levies on digital equipment and blank digital recording media. Levies on digital technologies and media (such as personal computers and flash memory cards) would create a significant new barrier to trade in these goods and put them beyond reach for many consumers. Levy systems also lack balance and are inefficient. They force consumers to pay more for technologies even if they do not use them for unauthorized copying.
- **Term of protection:** Where the term of protection of a work is calculated on the basis of the life of a natural person, the term should be not less than the life of the author and 70 years after the author's death. Where the term of protection is calculated on a basis other than the life of a natural person, the term should be not less than 95 years from the end of the calendar year of the first authorized publication of the work. Failing such authorized publication within 25 years from the creation of the work, the term should end not less than 120 years from the end of the calendar year of the creation of the work.
- **Narrow exceptions to protection:** The FTA should require each country to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the right holder.
- **Contractual rights:** Any natural or juridical person acquiring or holding any economic rights in a work should be able to freely and separately transfer such rights by contract. Any natural or juridical person acquiring or holding such economic rights by virtue of a contract, including contracts of employment underlying the creation of works, should be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights.
- **Protection of rights management information:** As required by the WCT, adequate and effective legal remedies should be afforded to protect rights management information from unauthorized alteration and removal.
- **Right of communication to the public:** Copyright holders should have the exclusive right to authorize or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.

- **Trade secret protection** : In addition to relying on copyright protection to protect their valuable intellectual property, many software companies rely on trade secret protection as well. To ensure adequate protection for trade secrets, the U.S. - Australia FTA should include an obligation like that in Article 1711.4 of the NAFTA (“No Party may discourage or impede the voluntary licensing of trade secrets by imposing excessive or discriminatory conditions on such licenses or conditions that dilute the value of the trade secrets.”)

**The enforcement section of the U.S. – Australia FTA should provide greater clarity regarding TRIPS level protection, as well as building on the obligations in that Agreement. More specifically,**

- **Lack of resources does not excuse compliance**: It is important to clarify that a lack of resources does not excuse compliance with the enforcement obligations of the FTA.
- **Criminal remedies**: Criminal remedies are an important component of a deterrent judicial system. Such remedies should be available at least in cases of significant willful infringements which have no direct or indirect motivation of financial gain, as well as in cases of willful infringement for purposes of commercial advantage or financial gain. It is critical that the penalties available be sufficiently high to ensure that pirates do not view them merely as a cost of doing business. They must actually deter further infringements.
- **Criminal sanctions for business end user piracy**: Australia should be required to introduce amendments designed to ensure that criminal sanctions apply to business end user piracy.
- **Level of criminal enforcement**: Australia should be required to significantly increase the level of criminal enforcement of software piracy.
- **Level of criminal penalties**: Australia should be required to introduce measures designed to ensure that the penalties which are applied in practice for copyright and trade mark offences are adequate to provide a deterrent against copyright and trade mark piracy.
- **Level of fines and damages**: Statutory maximum fines must be sufficiently high to act as a deterrent and actual fines and damage awards should be imposed by the judicial authorities at a level to make this deterrent effect credible by removing any gain to the infringer. Civil damages should be sufficient to compensate the right holder for the injury suffered because of the infringement and should include the profits of the infringer that are attributable to the infringement and not otherwise taken into account. In determining injury to the right holder, the judicial authorities must consider the value of the infringed-upon good or service, according to the suggested retail price of the legitimate good or service, or other measures established by the right holder for valuing such good or service.
- **Statutory damages**: To ensure deterrent civil damages, a system of pre-established damages in lieu of proving actual damages should be adopted.
- **Presumption of ownership and subsistence of copyright**: To improve the operation of the civil justice system by making it easier for right holders and judges to bring cases to conclusion, the U.S. – Australia FTA should provide that the physical person or legal entity whose name is indicated as the owner of copyright in the work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the lawful right holder. In the absence of proof to the contrary, it should also be presumed that the copyright subsists in such subject matter. Such presumptions should also pertain to criminal cases until the defendant comes forward with credible evidence putting in issue the ownership or subsistence of the copyright.

- **Customs** Customs authorities should be able to initiate border measures *ex officio*, without the need for a formal complaint by an authorized private party or association or the right holder. Border measures should be applicable to goods in-transit and to goods destined for export.
- **Remedies for violations of TPMs and RMI obligations:** Civil and criminal remedies should expressly cover violations of technological protection measures and rights management information obligations. All remedies and enforcement procedures applicable to copyright infringement should apply to the obligations dealing with the circumvention of technological protection measures and with rights management information.
- **Ex parte orders:** The FTA should establish clear requirements regarding the availability of *ex parte* search orders. Right holders should be required to produce only evidence reasonably available to them, and the conditions for obtaining the orders should not unreasonably deter recourse to the procedure. Requests for *ex parte* search orders should be acted upon and executed within ten days, except in exceptional cases. Any security or bonding obligations should not be so high as to unreasonably deter recourse to the *ex parte* search order procedure.

### Electronic Commerce

One of the most important developments since the conclusion of the Uruguay Round Agreements is the evolution of the Internet and the e-commerce opportunities it promises. BSA Members have a tremendous stake in these developments. Today just 13 percent of software is sold on-line. A recent survey of BSA CEOs showed that by 2005, they expect that 66 percent of all software will be distributed through the Internet.

To ensure that the U.S. – Australia FTA satisfies the U.S. negotiating objectives set forth in the TPA legislation and supports the growth of the high tech economy in both countries, it is essential that the Agreement contain a high quality chapter on electronic commerce. The obligations in this Chapter should ensure clarity and predictability in the international trade rules applicable to electronic commerce, should prevent barriers to electronic commerce from arising, and should preserve the current liberal trading environment for digital products.

A key goal of this Chapter must be to ensure that software delivered electronically receives the same benefits and concessions that software traded on a physical medium currently enjoys under existing WTO agreements. Software that is made available on-line should receive market access, MFN and national treatment no less favorable than the software would receive if it were traded as a good through physical delivery.

BSA notes with disappointment that Australia did not sign on to the recent APEC Leaders Statement on Trade and the Digital Economy. As part of the FTA negotiations, the United States should ensure that Australia commits to the principles enshrined in that document.

#### Key Elements of the E-commerce Chapter in the U.S. – Australia FTA:

- Confirmation that the supply of a service by electronic means falls within the scope of obligations on services.
- A permanent prohibition on duties on the importation or exportation of digital products, including both the transmission and its content.
- A requirement that national treatment rules apply to digital products. The FTA should include an obligation not to discriminate against digital products on the basis that they are

created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms outside Australia, or on the basis that the author, performer, producer, developer or distributor of such digital products is a foreign person.

- A requirement that MFN rules apply to digital products. The FTA should ensure that these countries do not treat digital products created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the United States less favorably than digital products created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in other countries.
- A prohibition on imposing quantitative restrictions on digital products.
- A requirement that domestic regulations affecting digital trade be transparent and non-discriminatory, and that parties select the least trade restrictive measure available to address valid public policy objectives.
- A requirement that existing disciplines on subsidies apply to digital products.
- A requirement that any formalities, including border measures, should be streamlined or eliminated wherever possible to ensure they do not become impediments to e-commerce and the technology required to sustain and improve it. Any formalities must be transparent, notified to the other Party, and cannot impose requirements on how the devices and software used to consummate an e-commerce transaction are designed or deployed.

### Services

A vast array of e-commerce services has evolved since the conclusion of the Uruguay Round. These include data storage and management, web hosting, and software implementation services. Given the increasing trend for technology users to purchase information technology solutions as a combination of goods and services, liberalization in this area now has even greater importance. Just as Australia has joined the ITA and taken actions to open its market to reap the benefits of information technology goods, it should commit equally to the liberalization of information technology services to fully realize the potential benefits that the combination of information technology goods and services can bring.

In the WTO, Australia's commitments in the Computer and Related Services (C&RS) sector are incomplete. The country has made full commitments with respect to four of the five subsectors, including consultancy services related to the installation of hardware, software implementation services, data processing services, and maintenance and repair services. Australia has made no commitment whatsoever, however, with respect to database services. Database services are essential to modern e-commerce and IT services more generally. In addition, many IT services provide functionality from more than one of the subsectors of C&RS. Thus, Australia's failure to make a full commitment in this important subsector undermines the value of its commitments in other subsectors.

As it has done in its other recently-concluded bilateral Free Trade Agreements, the United States should insist that the U.S.- Australia FTA takes a "top-down" approach to scheduling services commitments. Such an approach ensures far superior coverage than the WTO GATS architecture. Furthermore, it is important that no exceptions be scheduled in the Computer and Related Services sector. Australia should commit to full market access and national treatment for all information technology services. This structure and scope will help ensure protection for evolving IT services, including those that are delivered electronically, and will help prevent new trade barriers from being created in the future.

BSA is also concerned about the growing potential for trade-distorting subsidies in the computer and related services area. The U.S. - Australia FTA should contain disciplines on subsidies that would ensure a level playing field for U.S. services suppliers.

### **Goods**

Australia is a member of the WTO Information Technology Agreement. Thus, it should have little difficulty accepting a commitment in the FTA to eliminate or phase out of all tariffs and non-tariff measures applied to information technology products. Consumers need access to the best, most cost-efficient technology products in order to grow their local IT markets. Tariffs that raise the costs of these products are counterproductive to efforts to grow IT literate economies.

The FTA should also contain a requirement that the customs value of imported carrier media bearing digital products be determined according to the cost or value of the carrier medium alone, without regard to the value of the content stored on the carrier medium.

### **Government Procurement**

Australia is not a member of the WTO Agreement on Government Procurement (GPA), but only an observer. The GPA is an important agreement, and BSA supports using the FTA process to ensure that more U.S. trading partners adhere to its disciplines. The GPA contains an important national treatment provision, as well as a requirement that technical specifications "shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade."

The United States' bilateral procurement negotiations should build on these obligations and seek to strengthen them. Australia's procurement law and practices explicitly favor the development of Australian industry. Through the U.S.-Australia FTA, the United States should ensure that information technology procurement in Australia is decoupled from industry development criteria or objectives across all levels of government. Industry development should be determined by the free interaction of market forces and should not be influenced or driven through the procurement process. Government procurement should be based on price, terms and conditions and service/product offerings. Incorporating industry development goals into the procurement process distorts the process, adds additional cost and time to the process, leads to sub-optimal and short term industry development outcomes, and restricts the ability of many firms to bid on large Government contracts. Examples of problematic discriminatory practices in Australian government procurement include "in-scope" and "out of scope" requirements, endorsed supplier industry development requirements, model industry development criteria, and requirements for a 10% and 20% industry development small-to-medium enterprise component in all tenders over \$5 million.

Another objective of the procurement chapter of the U.S. - Australia FTA should be to ensure that our trading partners procure software on its merits, and not simply the model of its development. U.S. trade policy should encourage our trading partners to procure the software that best meets their needs -- based on functionality, performance, security, value, and life-cycle cost -- and to avoid any categorical preferences based on software development models.

Another key objective should be to ensure full coverage of services in the government procurement obligations of the U.S. - Australia FTA. Given the importance and projected growth of the service sector, any government procurement chapter in the FTA that does not apply equally to the procurement of services would be completely inadequate. BSA is particularly concerned that the government procurement chapter apply to procurement of IT services.

### **Conclusion**

BSA appreciates this opportunity to comment on the intellectual property, e-commerce, services, goods and government procurement issues that should be addressed in the U.S. –Australia FTA. Our members look forward to working with U.S. Government officials as the negotiations proceed, and stand ready to provide any additional information that might be useful to support the negotiators.

Respectfully submitted,

Business Software Alliance