

# INQUIRY INTO THE ENFORCEMENT OF COPYRIGHT IN AUSTRALIA

## SUBMISSION OF THE AUSTRALIAN VISUAL SOFTWARE DISTRIBUTORS ASSOCIATION LTD

### 1. Introduction

1.1 The Australian Visual Software Distributors Association Ltd ('AVSDA') welcomes the opportunity to make a submission in relation to this issue.

1.2 AVSDA was formed in 1983 to represent the interests of owners of copyright in, and distributors of, visual software and distributors of videos in Australia. Visual software is essentially computer software used to generate computer images, such as the software used to produce interactive computer games. AVSDA's members are as follows:

21st Century Pictures  
Activision Australia  
Buena Vista Australia  
CIC Video  
Columbia TriStar Home Video  
Dataflow/Wolf Interactive  
Directsoft  
Electronic Arts  
Festival Video  
GT Interactive Australia  
Hilad Corporation  
Interplay Productions Pty Ltd  
Microprose Asia Pacific  
Network Entertainment  
Nintendo Australia  
Polygram Video  
Rainbow Video  
Roadshow Entertainment  
Rocvale Entertainment Pty Ltd  
Ozisoft  
Sony Computer Entertainment

Time-Life  
Twentieth Century Fox Home Entertainment  
Warner Home Video  
Warner Vision

- 1.3 The issue of copyright infringement is extremely important to the AVSDA, whose members manufacture or distribute copyright games or videos which are particularly susceptible to illegal duplication or to importation, without the approval of the copyright owner.
- 1.4 AVSDA believes that the *Copyright Act*, as presently drafted, fails to provide an adequate framework within which to enforce the legitimate rights of its members to protect their intellectual property interests. Consequently, the incidence of copyright infringement in the area of visual software and videotape and similar materials continues to grow.
- 1.5 If the Australian Government wishes to promote a viable visual software industry in Australia, it is important that the industry receives the protection required by international treaty. If pirate materials and parallel imports are permitted to impact on the Australian market by reason of the difficulty of enforcement, it will affect the local industry as well as legitimate distributors in Australia.
- 1.6 AVSDA therefore supports the call by the Motion Pictures Association ('MPA') for amendments to be made to the *Copyright Act* to enable copyright owners and distributors to rely upon a statement embedded in a film, including a video game, as to the identity of the owner as proof of that fact.

## 2. Background

- 2.1 Visual software first became available in Australia in 1980. It first took the form of hand held video games such as 'Game Boys' which are Nintendo products. These products rely on software which is contained in a cartridge. More recently Sony developed a 'Play Station' product which operates through connection to a video screen. These products operate on software which is contained on CD-Rom. CD-Rom games playable on personal computer are also available in Australia.

- 2.2 Visual software has been found to be cinematograph film within the meaning of the *Copyright Act (Galaxy Electronics Pty Ltd v Sega Enterprises Ltd (1997) 37 IPR 462)*.
- 2.3 Like cinematograph films in video, DVD or like format, computer games are very popular consumer products and attract the attention of 'entrepreneurs' who attempt to exploit these products by reproducing or importing them without the authority of the copyright owner.
- 2.4 As CD-Roms are relatively easily copied and reproduced in large quantities with minimal expense, the major difficulty experienced in Australia is with the importation or production of cheap pirate copies.
3. Level of infringement
- 3.1 Determining the amount of infringing product imported into Australia or product in Australia can only be a matter of estimation. At present it is thought that pirate copies of video games has reached 20% of the legitimate trade. Parallel imports probably account for a very small part of this. The last three years has seen a considerable drop in parallel imports and a large rise in pirate copies.
- 3.2 The effect infringing copies have on the market can be graphically illustrated as follows. In May 1998 Sony released a video game based on car racing which is called 'Gran Turismo'. The game was extremely popular and it sold 190,000 units. At the time of release approximately 600,000 units of hardware had been sold on which the 'Gran Turismo' could be played. In April 1999 Sony released a new racing car game called 'Ridge Racer 4'. Based on the success of the previous game and the fact that hardware sales had increased to 1 million units, Sony expected sales of 100,000 units. In fact, it has only sold 40,000 units and has been told by retailers they cannot sell any more because there are so many pirate copies available.
- 3.3 The incidence of copyright infringement in the area of visual software grows with the increase in the size of the market. In June 1998, the Business Software Alliance (the principal trade association of the software industry in the United States) and the Software Publishers Association (representing the world's leading software developers) released a report indicating that:

*'[r]evenue losses to the worldwide software industry due to piracy were estimated at \$11.4 billion, and that in Australia in 1997, losses were estimated at \$129,44,000'.*

4. Effect of infringement

4.1 Parallel importation and the production or importation of pirate products has the following effects:

- (1) copyright owners are deprived of the fruits of their labour;
- (2) incentives for Australian copyright owners to continue to produce works and invest time and money in developing new products are diminished;
- (3) classification and censorship requirements on products are often breached; and
- (4) consumers may suffer as a result of diminished controls and support.

4.2 In the area of new technologies (such as software) there is a need for strong intellectual property laws to attract technology and investment as a basis for economic development. Without such interest, it is likely that the industry will falter over time, and producers will move to other markets where protection is better and the volume of sales greater.

4.3 AVSDA members have worked with the Government in implementing practical and workable steps to ensure compliance with the relevant legislation. AVSDA's members are scrupulous in ensuring that classification requirements are complied with. The same cannot be said of parallel importers of interactive games who offer no service network nor can there be any assurance that they take any notice of classification requirements. AVSDA is aware of a number of parallel importers of games who literally operate from the back of a van and are contactable only by mobile phone numbers. These parallel importers have no interest in ensuring the games they are selling are properly classified and are sold only to the relevant population.

4.4 AVSDA members distribute between 90-95% of the video games marketed in Australia, hence it is possible for the industry itself together with the Customs and Censorship

authorities to monitor and control the overwhelming majority of product. Under an open import regime such control would be impossible.

- 4.5 AVSDA members publish and distribute a high quality product appropriate to the Australian market and provide a high level of technical support which they could not continue to provide if they were competing with parties who are in effect free riding on the good reputation of the copyright owners and Australian distributors of these games.
5. Prosecution of copyright infringement
- 5.1 A major impediment presently facing owners of copyright in visual software who wish to pursue legal action to enforce their rights is the difficulty in establishing copyright ownership within the terms of the legislation.
- 5.2 Many of the interactive games sold in Australia originate in Japan and are the result of the labour of many people. The individuals involved are not always employees of the company overseeing production, and it is difficult to obtain copies of written contracts (if any) under which other involved individuals are working. In addition, such documents are often located overseas, and written in languages other than English. In order to trace the ownership of the relevant intellectual property it is necessary to prove that the creators of the software are employees, or are independent contractors who have assigned copyright to a company claiming copyright ownership. Documentation may be held in a number of different locations which makes it very difficult to establish a clear chain of title in the work.
- 5.3 A further difficulty arises from the fact that overseas operators who sell legitimate product to legitimate distributors in Australia do not provide as a matter of course the level of documentation which would be necessary to enable a licensed distributor to protect their rights in Australia. There is a strong desire on the part of such operators to protect the confidentiality of their operations and, in particular, the identity of the artists and technicians responsible for front line production. While such reticence is understandable, it does little to assist a distributor in proving copyright if this becomes necessary.

- 5.4 To date, infringers who have been prosecuted under the *Copyright Act* have not sought to challenge ownership, however AVSDA considers it is only a matter of time before this occurs.
- 5.5 Of immediate concern is the fact that the Australian Federal Police ('AFP') require basic material in relation to proof of ownership before they will commence proceedings against infringers. It is difficult to obtain this material and in any event takes considerable time.
- 5.6 Once an infringement action is brought against an infringer, it is a straightforward matter for an infringer, which is aware of the intricacies of the *Copyright Act*, to capitalise on the failure of the Act to accommodate this situation, and put the copyright owner to proof of ownership.
6. Enforcement
- 6.1 AVSDA has experienced a marked reluctance by the AFP to prosecute for infringement of copyright in visual software under the *Copyright Act*, as is the case with prosecution of offences relating to importers of pirate or unauthorised imports of videos and DVDs.
- 6.2 We believe there are two reasons for this. The first is the concern of the AFP that they may commit resources to prosecuting offences and then be unable to prove copyright, and the second is the claim often made that other matters have a higher priority.
- 6.3 The AFP now requires that the Australasian Film and Video Security Office ('AFVSO'), which acts for AVSDA in obtaining evidence of breach, to provide to it basic materials proving ownership before it will proceed to a prosecution. We believe that if ownership was easier to prove, the reluctance of the AFP to prosecute may be partly overcome.
- 6.4 However, we also believe that it is necessary that the AFP understand that breach of copyright is an economic crime, which causes considerable damage to copyright owners and licensees and should receive a high priority in their role as enforcers of Australian law. In that regard, we note that AFVSO obtains evidence of breaches which it provides to the AFP and goes to considerable effort to assist the AFP in providing any material which is needed for a successful prosecution.

7. Proposal for Australia

7.1 AVSDA supports the MPA's proposals for legislative amendments in Australia.

7.2 AVSDA also draws attention to section 130A of the *Copyright Act* which provides:

*'In an action for infringement of copyright described in section 37, 38, 102 or 103 by an act involving an article that is a copy of a sound recording, it must be presumed that the copy is not a non-infringing copy unless the defendant proves that the copy is a non-infringing copy.'*

*Note 1: Sections 37 and 38 deal with infringement of copyright in literary, dramatic and musical works (among other things) by commercial importation and dealings involving articles.*

*Note 2: Sections 102 and 103 deal with infringement of copyright in sound recordings (among other things) by commercial importation and dealings involving articles.'*

AVSDA believes that a similar provision could be introduced for cinematograph films, including computer games.

7.3 AVSDA also considers that the AFP should be directed to take a far more active role in enforcing copyright. The industry is prepared to assist the AFP to this end, as it always has. We believe that it may assist if a standing committee was established consisting of representatives from industry, the AFP and the Attorney-General's department to monitor copyright infringement and the measures taken to enforce copyright.

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