

Internet Industry Association

Mr Brenton Holmes
Secretary, Senate Select Committee on Aust-US FTA
Senate Foreign Affairs, Defence and Trade Committee
Parliament House
CANBERRA ACT 2600

Article 17.11.29 of the US-Australia Free Trade Agreement (FTA)

Dear Mr Holmes

Further to evidence given before the Committee on 4 May 2004, I am pleased to provide the following supplementary points covering matters raised in my oral submission.

The Association believes these principles should guide the drafting of legislation to give effect to the FTA.

Implementation principles

- service providers¹ should not be required to disclose subscriber information without a judicially made court order (ie. not an administrative process)
- a 'repeat infringer' is a person that has been found by a court to be an infringer on more than one occasion with regard to the same service provider (ie, receipt of more than one notice is not sufficient evidence of repeat infringement)
- in relation to termination in 'appropriate circumstances', a service provider to be compelled to terminate an account if and only if they are in receipt of a court order which expressly requires termination of that service by that named ISP
- service providers should not be required to exercise any judgment about infringement; the mere allegation of copyright infringement in a takedown notice directed to an ISP should not trigger an obligation for the ISP to terminate its subscriber's internet access or disclose information about the subscriber
- service providers should not be regarded as having 'actual knowledge of an infringement' without a court order declaring that an infringement has occurred

¹ For the purposes of this paper, 'service providers' include ISPs and content hosts

- service providers should not be regarded as 'becoming aware of facts or circumstances from which infringement was apparent' unless it receives an effective takedown notice (consistent with the statement in the FTA that service providers should not be required to monitor their services)
- service providers should be able to act on a notice complying with the formal requirements without having to investigate or make an independent assessment of infringement
- failure to comply with the notice and takedown procedure must not trigger automatic liability for copyright infringement. Rather, liability should be assessed in accordance with general authorisation liability principles
- safe harbours should exist to clarify when service providers do not have liability and should not be used to create a de facto liability standard; compliance with the safe harbours should not be mandatory ie should not give rise, without more, to liability for direct infringement or authorisation of infringement for acts falling within the safe harbours
- a service provider is not liable for direct infringement or authorisation of infringement for acts falling within the safe harbours (this must be an absolute protection from liability, not a prima facie protection)
- service providers should have a statutory immunity from liability in complying with a properly issued takedown notice, both from suit from rights holders but also from those whose content they are removing; the immunity should be broadly cast along the lines of the Broadcasting Services Act
- a service provider who has taken reasonable steps to comply with a notice and takedown procedure, but cannot technically or legally do so, should still receive the full protection of the safe harbours
- service providers should be able to recover costs of complying with takedown notice on a revenue-neutral basis consistent with reasonable assistance provisions of the Telecommunications Act 1997
- the qualifications to the safe harbour on caching do not take into account present realities; accordingly the qualification that caching activities only be protected where the provider complies with internationally recognised standards is not reasonable, since no such standard exists (this may be accommodated by regulation later)

- conditioning the safe harbour for transmission etc. on the material being transmitted ‘without modification of the content’ should be applied in a technology neutral manner. Mere reconfiguration for platform translation of content (for example moving from web to phone display) should not constitute a modification so as to defeat the immunity otherwise available to the service provider

“for material without modification of its content”

- *reformatting to be expressly excluded from modification;*
- *modification to be qualified or narrowed to “no substantial modification”;*
- *reference the DMCA legislative history, namely page 42 to clarify that it is the content and not the form that is not to be modified.*
- service providers should only be regarded as obtaining a ‘financial benefit directly attributable to the infringing activity’ where they knowingly participate in an infringement and receive a share of profits from the infringing activity
- service providers should not be regarded as obtaining a ‘financial benefit directly attributable to the infringing activity’ when they merely levy standard service charges (eg access charges or additional usage charges)
- s 39B should be preserved and extended to provide an effective safe harbour for transmission, storage and routing of content
- s 43A already creates a limited caching safe harbour which could be amended to comply with the FTA; any limitation to caching that is part of an ‘automated process’ must exclude manual configuration processes involved in the set up, operation or maintenance of a cache, or actions on the part of the end user which may be, in whole or part, manual
- the Act or regulations should set out the basic manner and form components of a notice and takedown regime, including the requirement for a statutory declaration to accompany a takedown notice, though an industry code may be developed to implement the regime and detail response time and cost recovery issues, as well as appeal processes for end users.

I am happy to take further questions from the Committee in respect of the foregoing material.

Yours sincerely

Peter Coroneos
Chief Executive
1 June 2004