



POSITION STATEMENT

Free Trade Agreement – Australia and the United States



ASTRA is extremely concerned that the proposed Commonwealth legislation to implement the Government's obligations under the Free Trade Agreement between Australia and the USA ('FTA') - *The US Free Trade Agreement Implementation Bill 2004* ('**Implementation Bill**') does not implement the Government's obligations under Article 17.7 of the FTA: Protection of Encrypted Program – Carrying Satellite Signals and on balance, places ASTRA's members in a worse position to address theft of subscription television services had the Implementation Bill not been introduced. ASTRA submits that this is not a desirable outcome for the FTA and seeks urgent amendments to the Implementation Bill.

Amendments sought are included in this submission as Appendix A which is a table setting out relevant parts of the FTA text, marked up amendments to the Copyright Act 1968 ('**Copyright Act**') made by the Implementation Bill and ASTRA's suggested amendments to the Copyright Act in order to achieve the correct intent and meaning of the FTA. These amendments ensure:

1. that 'personal use' of pirate subscription television services is an offence without qualification (including the attraction of criminal penalties);
2. that Section 135AS of the Copyright Act:
 - (a) retains the offence for a person to modify a broadcast decoding device; and
 - (b) does not introduce an additional test of 'intention' necessary to be proved in respect of commercial activities.

Introduction

Since 1998, ASTRA has made a number of representations to Government, the Department of Communications, Information Technology and the Arts ('**DCITA**'), the Department of Foreign Affairs & Trade ('**DFAT**') and the Attorney General's Department in relation to subscription television piracy and the adverse impact that it has on our industry.

Our most recent submission addressed to the Hon. Philip Ruddock and dated 21 June 2004 (attached as Appendix B¹) outlines our understanding of the proper interpretation of Article 17.7 of the FTA and in particular the meaning of "*receive and make use of*" contained in Article 17.7(1)(b).

You will see that this submission also highlighted additional issues including the anomaly of Article 17.7 in only obliging the Government to implement measures to ensure the protection of program-carrying satellite signals over and above program-carrying cable signals. Our submission also provided further information to address an apparent misconception that piracy is no longer a threat to the industry following the successful replacement by FOXTEL and AUSTAR of Irdeto Version 1 smart cards with Irdeto Version 4 smart cards.

ASTRA also wrote to both Mr Stephen Deady and the Honourable Robert Zoellick in October 2003 during the negotiations of the FTA to provide extensive information about subscription television piracy and its adverse impact in Australia. A copy of the submission is attached as Appendix C.

¹ Please note that the appendix to the submission to the Hon Philip Ruddock contains detailed information about a new pirate activity known as 'card sharing' and is available on request.

ASTRA is extremely concerned that the undertakings of Article 17.7 of the FTA have not been implemented in the Implementation Bill either by way of amendment to the Copyright Act or to any other Commonwealth legislation.

Background and Sequence of Events

1. ASTRA Submission October 2003

It is well known that the provisions of the *United States Digital Millennium Copyright Act of 1998* and *Communications Act of 1934* create criminal penalties for the personal use of pirated subscription television services. ASTRA's submission pointed out the incongruous protective measures adopted by each country to counter subscription television piracy and sought more robust legislative protection in Australia for the investments and copyright interests of both the United States and Australian film and television industries:

“With the rapid development of technology the subscription television industry must be equipped to respond to threats to the subscription television industry. Accordingly it is critical that appropriate sanctions be introduced in line with United States legislation prohibiting the fraudulent reception of subscription television services.”²

2. Explicit Understanding of the US and Australian FTA Negotiators

ASTRA understands that the US and Australian negotiators explicitly agreed that personal use (ie viewing) of pirated services, would be criminalized under the terms of the FTA. This amounted to a change of Australian Government policy with regard to the piracy of subscription television services. The aim of this was to bring Australian policy in line with the more robust US policy regarding this theft of service.

3. The explicit wording of Article 17.7 of the FTA.

Article 17.7(1)(b) of the FTA provides that “*each party shall make it ...a criminal offence willfully to receive and make use of, or further distribute a program-carrying signal that originated as an encrypted program-carrying satellite signal knowing that it has been decoded without the authorization of the lawful distributor of the signal.*”

It is clear from the wording of Article 17.7(1)(b), that the Australian Government is obliged to make it a criminal offence where, without the authorization of the lawful distributor of a signal;

- a. a person receives that signal and uses it in the knowledge that it has been pirated; or
- b. a person who receives that signal and further distributes it in the knowledge that it has been pirated.

The only way in which someone can both ‘receive’ and ‘use’ a program carrying signal as outlined in the first scenario above is to view the programs being carried on that signal.

² ASTRA Submission to Stephen Deady and the Hon Robert Zoellick of 8 October 2003.

4. Singapore US Free Trade Agreement

Crucially, Article 17.7(1)(b) of the FTA does not mirror the requirement of the US Singapore Free Trade Agreement which makes it a criminal offence to receive a pirated signal. Rather, Article 17.7 introduces an additional element of “use” so receipt alone is not enough to meet a test of criminality – instead the crime would be committed if an individual also “used” the signal in any context or for any purpose which can only be to view the programs being carried on that signal.

ASTRA understands that this distinction from the Singapore US Free Trade Agreement was understood by both the Australian and US FTA negotiators on the basis that it still created a criminal action against personal use – albeit that the additional test of providing ‘use’ needed to be demonstrated before a criminal act could be said to have been committed.

5. Commercial Gain and the Correct Meaning of 17.7(1)(b)

The meaning of ‘make use of’ in Article 17.7(1)(b)

In April, DCITA sought ASTRA’s assistance to interpret the correct meaning of ‘make use of’. ASTRA was informed that one possible interpretation could be that ‘make use of’ obliged the Government to impose only criminal sanctions against the ‘commercial’ use of pirated signals. ASTRA submitted then as it does again now that this is not envisaged in Article 17.7 (Appendix B).

Since the release of the Implementation Bill, the suggestion has been made to ASTRA that the words ‘make use of’ actually require a commercial gain before a criminal offence occurs and as such, personal use in itself is not a criminal offence under the FTA.

It is ASTRA’s view that the Government’s current interpretation of its obligations under the FTA is fundamentally wrong and does not properly reflect the intentions of both the US and Australian FTA negotiators. Had it been the intention of the FTA negotiators the very obvious opportunity to clearly articulate a commercial gain in the Article would have been seized: Article 17.7 would have included the words “*make **commercial** use of*”.

In addition, the only feasible way that receiving and using a pirated signal for commercial use can occur is by distributing that signal to other individuals for commercial gain. However, as this is explicitly dealt with in the additional wording “or further distribute” included in Article 17.7, a different type of ‘use’ has to be anticipated.

Accordingly, the only logical conclusion that can be made is that the personal use or viewing of programs contained on the pirated subscription television services is the “use” contemplated. There is no other possible application.

The absence of qualification to Article 17.7(1)(b)

Importantly, the drafting of Article 17.7(1)(b) is not qualified.

In addition, Article 17.7(1)(b) is not made subject to Article 17.11.26(a) which reads as follows:

"Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful copyright piracy on a commercial scale. Wilful copyright piracy on a commercial scale includes:

- (i) significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain;*
- (ii) wilful infringements for the purpose of commercial advantage or gain."*

It appears from the drafting in the FTA that where it was intended that the criminal offence provisions be limited, this was expressly provided for. For example, Article 17.4.7(a) and Article 17.4.8(a) both state:

"Each Party shall provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for purposes of commercial advantage or financial gain."

Even if Article 17.11.26(a) does somehow apply to 17.7(1)(b) then ASTRA believes the continued pirating of its member's services by an individual constitutes significant wilful infringement which means the offence provision should not be qualified (see Article 17.11.26(a)(i)). Alternatively, if Article 17.11.26(a)(ii) applies then a person is clearly obtaining a commercial advantage or profit by avoiding having to pay subscription fees to the distributor of the subscription television service. This is equivalent to attending but not paying the admission fee at a cinema for example. In both instances, such conduct amounts to theft of a service and is comparable to theft of other household services or utilities such as electricity or water to which criminal sanctions apply for 'use'. However, this type of commercial gain has been explicitly excluded through the definition of profit³: *"profit does not include any advantage, benefit or gain resulting from or associated with any private or domestic use of any copyright material"*.

6. Government Policy

The current wording dealing with subscription television piracy in the Implementation Bill is defended as an intended outcome given the Government's policy on personal use of copyright material.

However, it is clear that a policy change was intended to be made on the specific issue of criminalization for personal use of pirated subscription television services and yet the Australian Government has not introduced appropriate amending legislation.

The Importance to ASTRA

It is essential that the Government recognises that the ongoing piracy of subscription television services continues to be regarded as a significant, tangible threat to the future viability of the Australian subscription television industry and its ability to continue to develop innovative entertainment media experiences for Australian consumers.

It has been suggested that our industry should have derived sufficient comfort from the introduction of amendments to the Copyright Act that provide civil remedies in relation to piracy. While there are some

³ The definition of profit amends Section 135AL of the Copyright Act.

positive gains from these amendments in respect of personal use, ASTRA is extremely concerned that the proposed amendments contained in Part 9 of Schedule 9 of the Implementation Bill ultimately place ASTRA's members in a worse position than the industry would have been had those amendments not been introduced.

This worse position is arrived at due to:

- (a) the introduction into Section 135AS of the Copyright Act of a new test of 'intention';
- (b) the explicit exclusion of a criminal sanction for personal use in both the Implementation Bill and accompanying Explanatory Memorandum; and
- (c) the adverse effect that this potentially has upon ASTRA's member's abilities to use state and territory legislative provisions to address the issue of piracy.

The most damaging is the explicit exclusion in the Implementation Bill of criminal sanctions against the personal use of pirated subscription television services. By taking this course, the Government is signalling that it officially condones and endorses the piracy of subscription television services within Australian households.

As a result, the subscription television industry is severely hampered in being able to educate Australian consumers that the ongoing piracy and theft of subscription television services is illegal.

The following sets out these concerns in greater detail:

1. Fighting piracy through a moral decision by Australian citizens not to pirate

The 'war' against subscription television piracy and ultimately the protection of the future viability of the subscription television industry and its ability to further develop digital television services, implement technological improvements and innovate the consumption of media in Australia as well as increase the training and employment opportunities of creative and technical Australians will ultimately be won or lost by a decision made by ordinary Australians not to pirate subscription television services because it is wrong to do so. While many 'battles' against piracy can be fought with technological upgrades, so long as demand exists for obtaining access to pirated subscription television services there will always continue to be the illegal supply of the means to achieve this.⁴

The message that piracy is a crime is fundamental to any future protection the industry can hope to have against piracy of its services.

Without the Government's support in this area, the industry's ability to convincingly deliver this message is severely inhibited. The Government is in the best position to take the necessary action to affirm a message crucial to the future growth of the subscription television industry. By assisting to deter demand, the Government also assists to deter supply – proving a tangible way by which the Government can offer support to the subscription television industry to combat the ongoing theft of their services.

⁴ As discussed in ASTRA's submission of June 21, 2004 referred to in Appendix B.

2. The Knock-on Effect

The deterrence of piracy of subscription television services not only assists the subscription television industry and its many service providers to grow business and provide Australians with better and more cost effective services, it also limits the financing of well developed organized criminals who are known to receive considerable funding through out the world via funds received through sales of equipment to pirate subscription television.

Pirate activities globally are proved to be linked to groups involved in the smuggling of illegal immigrants, terrorism, extortion, money laundering, drug sales and extreme violence.

3. Timing is Crucial

Subscription television is still developing in Australia. Perceptions are being formed in the hearts and minds of Australians as to their approach towards many aspects of this service including the value and acceptable use of the commodity.

At the same time, the ‘would be’ sellers of pirate services are watchful and focused upon the efforts of ASTRA to criminalize personal use and equally focused upon the Government’s response to these efforts.

4. How pirate services are sold to ordinary Australians

Pirate services are regularly sold to Australians through a sophisticated network of sellers on the proposition to the consumer that there is nothing illegal about the personal use of a device to enable them to pirate subscription television. The pitch is made by the seller that it is the seller that is committing a crime and not the potential user of the service. Therefore there is no risk and no guilt – the consumer is told that they are not doing anything wrong.

While the illegality of the purchase and use of pirated services has been somewhat muddled in the context of applying current federal legislation (and certainly through the imperfect provisions contained in state and territory criminal legislation), new provisions outlined in the Implementation Bill makes it explicitly clear that the piracy of subscription television services in Australian households is condoned by the Government:

*“**profit** does not include any advantage, benefit or gain resulting from, or associated with, any private or domestic use of any copyright material.”*

This is further confirmed in the Explanatory Memorandum to the Implementation Bill at paragraph 624:

“The definition ensures that a person cannot be subject to criminal proceedings where they have obtained an advantage, benefit or gain resulting from or associated with private or domestic use of copyright material.”

The Government clearly states that personal use is not a crime.

5. State and Territory Legislation

The wording in the Explanatory Memorandum also fundamentally puts at risk an ability to pursue criminal proceedings under current imperfect state and territory criminal legislation. There have been limited but important benefits to the industry from the 12 arrests made under state provisions. Future action down this path is likely to be futile given the potential for an absolute defence provided under the Explanatory Memorandum.

6. The ‘Intention’ Requirement

The Implementation Bill amends Section 135AS of the Copyright Act in respect of commercial activities to introduce an additional test necessary to prove guilt: “*the intention of obtaining a commercial advantage or profit*”. Once again, the Implementation Bill puts the subscription television industry in a worse position than was previously the case given that prosecutors will have to overcome an additional hurdle in order to establish a conviction under Section 135AS of the Copyright Act.

7. The experience Overseas

ASTRA notes the messaging delivered by its US and Canadian counterparts such as the National Cable Television Association (‘NCTA’) and Canadian Cable Television Association (‘CCTA’) in their attempts to reduce piracy of cable television services.

Both organizations have relied on their ability to send the message to consumers that ‘theft is theft’: directly linking piracy of subscription television with other crimes (theft of a car, or a hand bag or shoplifting etc) to which criminal penalties are associated. By tapping into the moral decision being made by citizens of their respective countries not to pirate, both organisations have discovered that this is the most effective and successful way to reduce the demand for pirated subscription television services.

8. The Message that the Australian Government is now sending

The Implementation Bill and its failure to criminalize the personal use of pirated subscription television services sends the following messages from the Government to the Australian community:

- a. subscription television is not as valuable as other services, the theft of which amounts to a crime;
- b. theft of subscription television is not to be treated with the same degree of seriousness as other theft, such as shoplifting (for example), and therefore is not to be taken nearly as seriously by the community; and
- c. given the significant opportunity presented by the implementation of the FTA to reform legislation and policy, by taking the crucial decision that subscription television piracy by Australian households is not a crime, the Government has made a significant confirmation of policy not to criminalize personal use in the short to medium term. For pirates, the Government is effectively signaling that they may continue to further

develop infrastructure to service the demand for pirate subscriptions without risk that their potential customers will be deterred by the criminality of such networks.

Suggested Amendments to the Copyright Act

As mentioned previously, ASTRA includes suggested amendments to the Copyright Act necessary to achieve the correct intent and meaning of the FTA as Appendix A.

Other Legislative Reform

The stated view of Government is that “*copyright law should not unduly intrude into the private sphere*”.⁵ ASTRA submits that criminalization of the piracy of subscription television services should not have to alter this ‘umbrella’ policy position.

The theft of broadcast signals is not the same as other theft of copyright. It is not a one off recording or use of copyright material – it is a defrauding of a business through the continued, day-in day-out theft of a service. It is also a broadcasting issue. As a consequence the Government is open to consider amendments in other legislation where the stated policy position regarding copyright is not affected. This includes the Broadcasting Services Act 1992 (‘BSA’) and the Crimes Act 1914.

A precedent for use of ‘broadcasting legislation’ comes from the United States where legislative protection against the theft of subscription television service exists in both the Communications Act of 1934 and the Digital Millennium Copyright Act.

In fulfilling its obligations under the FTA, the Australian Government is open therefore to consider reform of legislation other than the Copyright Act in order to ensure that the true intent and meaning of Article 17.7 is successfully implemented.

Conclusion

It is crucial that domestic legislation enacted as a result of the implementation of the FTA properly reflects the understanding of both parties to the agreement and achieves their intended outcomes.

The absence of a criminal penalty associated with the personal use of pirated subscription television services means that the intended outcome of the FTA has not been achieved by the Australian Government. Instead, the proposed amendments to the Copyright Act place ASTRA and its members, on balance, in a worse position to combat theft of subscription television. This amounts to a breach of faith by the Government.

In addition ASTRA is not aware of any opposition by any group, organization or stakeholder towards the criminalization of personal use of pirated subscription television services.

ASTRA is conscious of the need for effective legislation to address the continuing threats to the services of our members.

ASTRA urges the Government to amend the Implementation Bill to appropriately reflect the true meaning

⁵ Paragraph 603 of the Explanatory Memorandum of the US Free Trade Agreement Implementation Bill 2004

of Article 17.7. ASTRA further seeks the opportunity to properly analyse and comment upon any amendments so that we may accurately inform the Government of the likely impact of legislative change and permit an appropriate level of consultation.