

Inquiry into the Copyright Legislation Amendment Bill 2004

Answers to Questions on notice placed by Senator Ludwig (Answers provided by the Attorney-General's Department, in conjunction with the Department of Foreign Affairs and Trade)

1. Will items 11 and 13 of the Bill enable persons other than copyright holders or exclusive licensees to force an ISP to take down allegedly copyright infringing material from their system?

No. Internet Service Providers (ISPs) are not compelled to make any changes to their procedures once the scheme commences. It is a voluntary scheme to limit the remedies available against service providers who choose to comply with it. Consequently, none of the provisions of the scheme, including items 11 and 13, of the Copyright Legislation Amendment Bill 2004 (the Bill) enable any person to force an ISP to take down allegedly copyright infringing material from their system or network.

If an ISP decides to comply with the conditions of the scheme there are certain circumstances that will require the service provider to remove or disable access to allegedly infringing copyright material. Items 11 and 13 of the Bill provide that the ISP must act expeditiously to remove or disable access if the ISP becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing.

It is possible that a person other than copyright owners or exclusive licensees may bring such facts or circumstances to a service provider's attention. Whether an ISP removes or disables access based on such facts or circumstances will depend on whether it is apparent that the material is likely to be infringing. It is intended that the ISP will only be required to take action where it is obvious that an infringement of copyright is involved. The ISP is not required to make any independent enquires regarding whether the material is infringing. It must be clear on the face of the material itself.

At this point it may be worth pointing out to the Committee the consequences for an ISP who chooses not to comply with the scheme (ie, does not comply with the conditions in items 11 and 13). The ISP is still required under existing law to take reasonable steps to prevent the infringing activity where they have the power to prevent the doing of the act concerned. However if they have not complied with the scheme the full range of remedies will be available against them if they are found by a court to have infringed copyright.

2. If so, is this requirement consistent with Australia's obligations under the US FTA and is it a requirement that applies to ISP in the US?

The constructive knowledge condition provided by items 11 and 13 of the Bill implements Australia's obligations under Article 17.11.29(b)(v)(B) of the Australia-United States Free Trade Agreement (AUSFTA) and is consistent with that obligation.

It is clear from text of the AUSFTA that the parties envisaged a non-exhaustive range of ways, including through a notification from the copyright owner, by which an ISP could become aware of facts or circumstances from which an infringement was apparent (constructive knowledge).

The constructive knowledge condition is necessary for the effective operation of the scheme. Without this condition ISPs could potentially qualify for the limitations on remedies even where they are aware of infringing material on their system or network and do not take action to remove or disable access to that material.

The United States have a 'constructive knowledge condition' in their safe harbour scheme [s512(c)(a)(ii) and s512(d)(1)(B) of the *Digital Millennium Copyright Act* (DMCA)].

3. If this situation does not apply to ISP in the US why is Australia introducing such laws?

Not applicable - see above answer.

4. Will the system that is being proposed be workable for ISPs-what will be the impact on their operations?

If the ISP decides to take advantage of the scheme then the conditions and the steps it must take to comply with the conditions will be clearly set out in the Copyright Act and Copyright Regulations.

The Government is confident that the scheme is workable for ISPs and will provide them with certainty in their dealings with actual and alleged copyright infringements.

ISPs are concerned that once the scheme comes into effect on 1 January 2005 they will face a similar problem to ISPs in the US that are reportedly being flooded by groundless automatically generated takedown notices. A number of points should be made regarding this issue. First, automatically generated notices already exist in Australia and it is not clear that they will proliferate following the commencement of the scheme. Second, those ISPs that receive such notices and wish to avoid liability for authorisation infringement are already required to take reasonable steps to prevent or avoid infringement. This will not change. Third, the draft Copyright Regulations provide a civil remedy for persons who suffer damage as a result material misrepresentations in notices where reasonable steps were not taken to ensure the accuracy of the notice.

ISPs are also concerned that they will be liable to copyright owners if they do not act in accordance with aspects of the scheme and liable to its customers if they do. None of the provisions of the scheme force an ISP to take any action. Further, the Regulations could provide that an ISP will not be liable for damages caused as a result of action taken in good faith to comply with a condition of the scheme.

5. How will ISPs respond if they become aware of potential copyright infringements?

ISPs currently have to consider what reasonable steps they need to take to avoid liability for an authorisation infringement in response to any information they become aware of that might point to potential copyright infringements. This will not change under the scheme.

However, following the introduction of this scheme they will have an additional question to consider – do they wish to protect themselves further by voluntarily participating in the scheme. If so they should comply with the expeditious takedown procedures to be set out in the regulations.

6. What will be impact of these new arrangements on the balance of rights and interests between copyright owners, copyright users and ISPs?

These new arrangements (and the regulations which will support them) represent an appropriate balancing of the rights and interests of copyright owners, copyright users and ISPs.

It is not appropriate that, where a copyright owner can prove that an ISPs became independently aware of material that was likely to be infringing on their system and did nothing until the copyright owner also became aware of the particular infringement and issued a formal takedown notice, the ISP should still be able to rely on the protections of the scheme.

The Government will monitor the operation of the scheme, including Regulations, consistent with its responsibilities for copyright law.

7. What will be the potential impact of these arrangements on copyright users?

In finalising this legislation and regulations supporting it, the Government has been, and will continue to be, concerned to minimise the impact on users wishing to access legitimate copyright material.