

FACT SHEET

US FREE TRADE AGREEMENT IMPLEMENTATION ACT 2004

LIMITATIONS ON REMEDIES FOR COPYRIGHT INFRINGEMENT AGAINST CARRIAGE SERVICE PROVIDERS

Amendments to the *Copyright Act 1968* (the Act) in the *US Free Trade Agreement Implementation Act 2004* (USFTAI Act) and the *Copyright Legislation Amendment Act 2004* (CLA Act) commenced on 1 January 2005. The USFTAI Act inserted a new scheme into the Act that limits the remedies available against carriage service providers (CSPs) for certain activities where the CSP complies with relevant conditions. Amendments to the *Copyright Regulations 1969* (the Regulations) which also commenced on 1 January 2005, prescribe procedural obligations in relation to some of the conditions.

The purpose of the scheme

The purpose of the scheme is to provide:

- legal incentives for CSPs to cooperate with copyright owners in deterring the infringement of copyright, and
- limitations on the scope of remedies available against CSPs for copyright infringements that they do not control, initiate, or direct, and that take place through their systems or networks.

Who can take advantage of the scheme?

A person seeking to limit remedies for copyright infringement under the scheme must fall within the definition of ‘carriage service provider’ in the *Telecommunications Act 1997*.

What activities are covered by the scheme?

There are four separate types of activities undertaken by CSPs that are covered by the scheme:

- Category A: Where the CSP acts as a conduit for internet activities through the provision of facilities for transmitting, routing or providing connections for copyright material.
- Category B: Where the CSP caches copyright material through an automatic process.
- Category C: Where the CSP stores copyright material on their systems or networks.
- Category D: Where the CSP refers users to an online location using online information location tools or technology.

Conditions

For each activity there are both general conditions applicable to all four activities and activity specific conditions that a CSP must comply with in order to take advantage of the limitations on remedies.

<p><u>General conditions</u></p>	<p>1. Adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of users who are repeat copyright infringers.</p>
	<p>2. Accommodate and not interfere with standard technical measures used to protect and identify copyright material in accordance with a relevant industry code. If an industry code is not in force, this condition does not apply.</p>
<p><u>Category A Conditions</u></p>	<p>1. Any transmission, routing or provision of connections for copyright material must be initiated by or at the direction of another person.</p>
	<p>2. The copyright material must be transmitted without any substantive modifications to its content. This condition does not apply to modifications made as part of a technical process, for example where ‘format shifting’ is necessary to provide access to copyright material via different technologies.</p>
<p><u>Category B Conditions</u></p>	<p>1. If the copyright material that is cached is subject to conditions on user access at the originating site the CSP must ensure that access to significant parts of the cached material is permitted only to users who have met those conditions. Examples of relevant conditions that may apply at the originating site include requiring registration or subscription in order to access the copyright material.</p>
	<p>2. If a relevant industry code is in force, the CSP must comply with relevant provisions of the code relating to updating the cached copyright material. It must also comply with any relevant industry code relating to not interfering with technology used at the originating site to obtain information about the use of the material.</p>
	<p>3. Any copyright material must be removed or access to the material blocked if the CSP receives a notice in the prescribed form that the material has been removed or blocked at the originating site. This action must occur expeditiously from the receipt of the notice. The Regulations prescribe the form to be used by copyright owners in relation to this condition.</p>
	<p>4. The copyright material must be transmitted without any substantive modifications to its content. This condition does not apply to modifications made as part of a technical process, for example where ‘format shifting’ is necessary to provide access to copyright material via different technologies.</p>
<p><u>Category C Conditions</u></p>	<p>1. The CSP must not receive a financial benefit that is directly attributable to the infringing activity if the CSP has the right and ability to control the activity. In deciding whether a financial benefit is directly attributable to the infringing activity a court must have regard to whether the benefit was greater than the benefit that would usually result from charging in accordance with accepted industry practice. The court may also have regard to any other matters it considers relevant.</p>

	<p>2. The CSP must expeditiously remove or disable access to material residing on its system or network upon receipt of a notice in the prescribed form that the copyright material has been found to be infringing by a court. The Regulations prescribe the form to be used by copyright owners in relation to this condition.</p>
	<p>2A. The CSP must act expeditiously to remove or disable access to copyright material residing on its system or network if the CSP:</p> <p>(a) becomes aware that the material is infringing; or</p> <p>(b) becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing.</p>
	<p>3. The CSP must comply with a prescribed procedure in relation to removing or disabling access to copyright material residing on its system or network.</p> <p style="text-align: center;">Prescribed procedure</p> <p>Notice and takedown</p> <p>This procedure applies where the CSP becomes aware of a matter in condition 2A as a result of receiving a notice of claimed infringement from the copyright owner.</p> <ul style="list-style-type: none"> • Where a copyright owner or the owner’s agent believes on reasonable grounds that their copyright material is being stored on a system or network controlled or operated by a CSP without their authority, they may forward a notice of claimed infringement to the CSP. The Regulations prescribe a form for notices of claimed infringement. • On receipt of the notice of claimed infringement, the CSP must expeditiously remove or disable access to the material referred to in the notice. • The CSP must then take reasonable steps to expeditiously forward the notice of claimed infringement to any user/s responsible for the material, and inform the user/s that the material has been removed or access to it has been disabled. • On receipt of notification from the CSP the user may issue a counter-notice stating that the user has a good faith belief that the notice of claimed infringement was issued as a result of mistake or misidentification, and providing the grounds for that belief. • On receipt of a counter-notification the CSP must forward the relevant details of the counter-notice to the copyright owner or agent (complaining party), including any grounds upon which the user has contested the notice of claimed infringement. • If the copyright owner or agent (complaining party) notifies the CSP within 10 working days that it has commenced proceedings seeking a court order to restrain the activity that is claimed to be infringing the CSP is not required to take any further action. • If the copyright owner or agent (complaining party) does not notify the CSP that they have commenced proceedings seeking a court order to restrain the activity that is claimed to be infringing within 10 working days, or the CSP is notified that the legal proceedings have been discontinued or were unsuccessful, the CSP is required to restore the material that is the subject of the counter-notice.

	<p>Takedown other than following notice by the copyright owner</p> <p>This procedure applies where the CSP becomes aware of a matter in condition 2A other than as a result of receiving a notice of claimed infringement from the copyright owner and has removed or disabled access to the copyright material residing on its system or network.</p> <ul style="list-style-type: none"> • As soon as practicable after removing, or disabling access to copyright material the CSP must notify the user in accordance with the Regulations. • On receipt of notification by the CSP the user may issue a counter-notice disputing the grounds for removing or disabling access to the material and requesting that the material be restored. <p>If a CSP receives a counter-notice and the information in the counter-notice satisfies the CSP that the material is not infringing or is not likely to be infringing, the CSP must restore or enable access to the copyright material.</p>
<p><u>Category D</u> <u>Conditions</u></p>	<p>1. The CSP must not receive a financial benefit that is directly attributable to the infringing activity if the CSP has the right and ability to control the activity In deciding whether a financial benefit is directly attributable to the infringing activity a court must have regard to whether the benefit was greater than the benefit that would usually result from charging in accordance with accepted industry practice. The court may also have regard to any other matters it considers relevant.</p> <p>2. The CSP must expeditiously remove or disable access to a reference residing on its system or network upon receipt of a notice in the prescribed form that the copyright material to which it refers has been found to be infringing by a court. The Regulations prescribe the form to be used by copyright owners in relation to this condition.</p> <p>2A. The CSP must act expeditiously to remove or disable access to a reference residing on its system or network if the CSP:</p> <p>(a) becomes aware that the material to which it refers is infringing; or</p> <p>(b) becomes aware of facts or circumstances that make it apparent that the material to which it refers is likely to be infringing.</p> <p>3. The CSP must comply with a prescribed procedure in relation to removing or disabling a reference residing on its system or network.</p> <p style="text-align: center;">Prescribed Procedure</p> <p>Notice and takedown system</p> <p>This procedure applies where the CSP becomes aware of a matter in condition 2A as a result of receiving a notice of claimed infringement from the copyright owner.</p> <ul style="list-style-type: none"> • Where a copyright owner believes on reasonable grounds that a reference (eg a hyperlink) provided by a CSP refers to copyright material which has been made available online without their authority they may forward a notice of claimed infringement to the CSP. <p>On receipt of the notice of claimed infringement the CSP must expeditiously remove or disable access to the reference referred to in the notice.</p>

Is compliance with the scheme by CSPs compulsory?

Compliance with the scheme is optional. While actions taken by a CSP in relation to the conditions of the scheme set out in the Act and Regulations may have some relevance to whether or not copyright infringement has occurred, the scheme does not affect the way provisions in the Act in relation to the determination of liability for copyright infringement should be interpreted or limit the application of the exceptions in the Act. Further, the failure of a CSP to qualify for any limitations on remedies in this scheme does not make the service provider liable for copyright infringement. A copyright owner must still establish that a CSP has infringed copyright under the Act.

Limitations on remedies

Where a CSP complies with the conditions relevant to a particular category of activity a court must not grant relief against a CSP for copyright infringement that consists of damages or an account of profits, additional damages or other monetary relief.

The scheme also provides for non-monetary orders that a court can make against a CSP in relation to the four categories of activity.

Are CSPs required to monitor their system or network?

A CSP is not required to monitor its service or to seek facts to indicate infringing activity in order to be eligible for any of the limitations on remedies associated with the four categories of online activity in the scheme. An exception occurs where the CSP is required to monitor its system or seek facts to indicate infringing activity in order to comply with an industry code in force, as set out by the general conditions in relation to accommodating and not interfering with standard technical measures used to protect and identify copyright material. At present there is no such industry code in force.

Form of notices

The Regulations prescribe the information that must be included in a notice under the notice and takedown procedures set out above, as well as notices for the removal of cached material that has been removed from the originating site and removal of material that has been found to be infringing by a court of law. Notices must be in accordance with, or substantially in accordance with, the forms prescribed in the Regulations.

Publically designated representative

CSPs must publicly designate a representative to receive notifications under the CSP liability scheme.

In order to satisfy this requirement they must provide a position title and information that is reasonably sufficient to enable contact with the representative. This information must be made reasonably prominent on the CSP's website.

Immunity from liability

The Regulations provide that a CSP is not liable for damages or any other civil remedy as a result of action taken in good faith to comply with the notice and takedown system.

If a CSP does not comply with a counter-notice (ie, chooses not to restore material where the complaining party has not commenced legal proceedings within a reasonable period of time) they will retain immunity from actions by the copyright owner, but will not receive immunity from legal actions initiated by subscribers or third parties.

Knowing misrepresentations

Where a party makes a knowing misrepresentation in a notice (including failing to take reasonable steps to ensure the accuracy of the information contained in the notice) any person who suffers a loss as a result of the misrepresentation may bring a civil action.

Making a knowing misrepresentation in relation to statements included in notices under the CSP liability scheme will also be a criminal offence under s137.2 of the *Criminal Code Act 1995*. In this case, the offence extends only to circumstances in which the person knew that the statements are false or misleading (as opposed to failing to take reasonable steps to ensure their accuracy).

Industry code

The Regulations provide that an industry code relating to accommodating and not interfering with standard technical measures used to protect and identify copyright material must be developed through an open, voluntary process by a broad consensus of copyright owners and CSPs. The code must also provide that 'standard technical measures' are technical measures that:

- are used to protect or identify copyright material
- are accepted under the industry code or developed in accordance with the industry code
- are available on non-discriminatory terms, and
- do not impose substantial costs on CSPs or substantial burdens on their systems or networks.

At present there is no such industry code in force.

More information

For copies of the USFTAI Act and the CLA Act (and Explanatory Memoranda) visit: www.comlaw.gov.au

If you would like more information on copyright generally visit <http://www.ag.gov.au/copyright>, or subscribe to the Attorney-General's Department's Copyright E-news at <http://www.ag.gov.au/www/enewscopyrightHome.nsf>