

FACT SHEET

US FREE TRADE AGREEMENT IMPLEMENTATION ACT 2004

AMENDMENTS TO CRIMINAL LAW PROVISIONS OF *COPYRIGHT ACT 1968* TO IMPLEMENT OBLIGATIONS IN AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT

Background

The *US Free Trade Agreement Implementation Act 2004* (USFTAI Act) and the *Copyright Legislation Amendment Act 2004* (CLA Act) made a series of amendments to criminal offence provisions of the *Copyright Act 1968* (the Act). The amendments implement general criminal law obligations under the Australia-United States Free Trade Agreement (AUSFTA). Both the AUSFTA and the criminal law offence amendments in the USFTAI Act and the CLA Act came into force on 1 January 2005.

The key criminal offence obligation under the AUSFTA is to provide for criminal procedures and penalties to be applied at least in cases of wilful copyright piracy on a commercial scale.

Under the AUSFTA, this includes two specific types of conduct:

- (1) where a person has committed significant wilful infringements of copyright with no direct or indirect motivation of financial gain.
- (2) where a person has committed wilful infringements of copyright for the purposes of commercial advantage or financial gain.

Implementation of this obligation has been achieved by a series of amendments to the criminal law provisions in sections 132 (general offences) and 135AS (broadcast decoding devices) of the Act.

Broadening the scope of existing offences

The amendments made by the USFTAI Act and the CLA Act will broaden the scope of offences in sections 132 and 135AS of the Act to criminalise certain activity involving infringing copies and broadcast decoding devices where that activity is committed 'with the intention of obtaining a commercial advantage or profit'. For example, the distribution from an internet site of infringing copies of movies or computer software not for profit but for some other commercial advantage (eg, attracting commercial sponsorship) may come within the scope of the offence.

The amendments will also broaden the scope of the offence in paragraph 132(1)(a) of the Act so that it applies to the making of infringing copies with the intention of obtaining a commercial advantage or profit (thereby strengthening the current offences regime that targets activity such as 'business end user piracy'). For example, this will ensure that the offence is wide enough in scope to criminalise the making of infringing copies of computer software in a business for internal commercial use.

Importantly, the amendments include a definition of ‘profit’ which excludes ‘any advantage, benefit or gain resulting from or associated with private or domestic use of any copyright material in the work or other subject-matter’. This ensures that the scope of the offences does not extend beyond commercial uses of copyright material in a work or other subject-matter.

New offence relating to significant infringement of copyright

The amendments also inserted new subsection 132(5DB) into the Act which makes it an offence where:

- a person has committed one or more infringements of the copyright in a work or other subject-matter,
- the infringement or infringements occur on a commercial scale, and
- the infringement or infringements have a substantial prejudicial impact on the owner of the copyright.

The offence is intended to implement the obligation under the AUSFTA that criminal procedures and remedies apply to a person who has engaged in significant infringing activity on a commercial scale but where they have no direct or indirect motivation of financial gain. For example, this offence may be committed by a person who creates a web site that allows infringing copies of movies or computer software to be downloaded to internet users for free.

Under new subsection 132(5DC) of the Act, certain matters are to be taken into account in determining whether one or more infringements on a commercial scale under subsection 132(5DB) occurs. These include the volume and value of any articles that are infringing copies.

Other fact sheets outline specific criminal law changes to other areas of the Act, including further changes to provisions dealing with broadcast decoding devices.

Where to get further information

For copies of the USFTA 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>