

Sample

Copyright infringement after the US Free Trade Agreement



US Free Trade Agreement Implementation Act 2004

No. 120, 2004

An Act to implement the Australia-United States
Free Trade Agreement, and for other purposes

ISP Copyright Safe Harbour Kit

LOGIE-SMITH LANYON LAWYERS 

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1. In a nutshell

- The US / Australia Free Trade Agreement resulted in changes to Australian copyright law.
- The changes affected ISPs and other carriage service providers.
- They created a way that ISPs can protect themselves against copyright damages claims e.g. in relation to movie and MP3 sharing by their customers.
- As long as the ISP obeys certain rules, they are in a 'safe harbour' i.e. they cannot be liable for damages in these cases.
- If the ISP is not within the rules, it does not have the protection of the 'safe harbour'.
- These changes took effect on 1 January 2005.

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Your notes:



4. The law summarised in plain English

This is a simplified summary of a complex area. It is cut down to the basics as they most commonly affect ISPs. The actual words of the *Copyright Act* are set out in Appendix 1.

4.1. What copyright means

As a general rule, only the owner of copyright in software, a music file or a movie can permit copies to be made and / or distributed.

4.2. Breaching copyright

If you do those things, you breach the owner's copyright.

You also breach copyright if you 'authorise' someone to do those things.

4.3. 'Authorise' has a special meaning

'Authorise' doesn't just mean 'give your actual permission to copy or distribute.' It can mean simply not stopping someone from copying or distributing, if you could have reasonably have stopped them.

The law specifically directs a court to consider these factors:

- (a) the extent (if any) of the ISP's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the ISP and the person who did the act concerned;
- (c) whether the ISP took the steps to prevent or avoid the doing of the act concerned and whether they complied with any relevant information.



Comment: Paras 4.1, 4.2, and 4.3 aren't anything new. They were the law *even before* the FTA amendments. Next, we come to the new parts of the law.

Your notes:



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4.4. Four kinds of activities

The new law deals with four kinds of service / activity:

A	Providing internet connectivity (allowing file transfer via email, FTP etc)	'Connecting'
B	Providing automatic caching (e.g. web cache)	'Caching'
C	Content hosting	'Hosting'
D	File locator services e.g. search engine or Kazaa-style index	'File Locating'

4.5. Remedies against you

If you obey the 'safe harbour' rules for each category, you can't be sued for money because of something a customer does that breaches copyright. The copyright owner can only seek these kinds of orders against you:

- If you are only providing Connectivity:
 - That you block access to some site / material from Australia.
 - That you terminate a customer account.
- If you are providing Caching, Hosting or File Locating:
 - That you remove material, take it offline or out of the search results.
 - That you terminate a customer account.
 - Something that achieves the same effect.

The Court must consider the burden on you, and technical feasibility, in making orders.

Comment: So far, so good. All the above works in your favour. It reduces the risk you face in these situations. But you next need to understand the 'safe harbour' rules you must follow in order to obtain the benefit of these protections.

Your notes:



6. **Your choices**

A ISP has a choice to make.

One way of dealing with the new law is to do nothing. If you are confident that you will never be held to 'authorise' an infringement, you may say: 'The safe harbour rules only matter if we find ourselves in court and need to avoid the risk of damages. Since we'll make sure we are never taken to court, we have no need of the safe harbour protections'.

Of course, someone who sends you a take down notice will argue that you started to authorise the infringement once you let it continue despite being warned. They'll say their notice served two purposes:

- To turn you into an 'infringement authoriser'.
- To deny you the benefit of the safe harbour rules.

This argument **could** succeed, so ignoring the new law could be very risky and costly.

The second choice is to adopt a compliance regime. We'll discuss that next.



Your notes:



9. About 'take down notices'

The take down process is explained Appendix 4. Basically, it involves 'official' notices and time limits to comply with them.

But do not be fooled into thinking that until only the official take down procedure counts, and you can ignore other 'take down' demands because they are not 'official'.

An 'unofficial' notice or warning might still be enough to turn you into a © infringement 'authoriser', e.g. by giving you reasonable grounds to believe that you are being paid to host infringing material.



Your notes:



10. Practical aspects of complying

- You will need a written policy about repeat offenders. It will need to be 'real' – the law says 'adopt and reasonably implement'.

A sample policy is set out in Appendix 2.

- You will need to direct staff clearly about not participating in infringing activities in their work capacities.
- You must check that the technical requirements listed in item 8 are satisfied.
- You should put in place procedures to ensure that demands, warnings, 'take down notices' and the like are referred to a staff member trained to deal with them properly – your 'Designated Representative'.
- Your Designated Representative must be clearly identified on your web site.
- To maximise compliance with the business, it would be wise to introduce written directions or policies dealing with all these things.

A sample direction to staff is set out in Appendix 3.

Sample

Your notes:



Appendix 4 – The take down notice regime

1. You must appoint a Designated Representative

It's simple: 'A carriage service provider must designate a person to be the representative of the carriage service provider (a designated representative) to receive notifications and notices issued under this Part for the carriage service provider.'

2. You must identify the Designated Rep on your web site

- In a reasonably prominent place
- Stating the rep's title in your organisation
- How to contact them, including:
 - email address
 - postal address
 - phone
 - fax

Your notes:

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3. The six different take down procedures

There are six sets of take down procedures:

B1	<ul style="list-style-type: none">• Owner complaint re cached material	i.e. where a copyright owner objects to something you are caching
C1	<ul style="list-style-type: none">• Owner notification of court ruling re hosted material	i.e. where a copyright owner notifies you that a court has ruled material infringing, and you host it
C2	<ul style="list-style-type: none">• Owner complaint re hosted material	i.e. where a copyright owner objects to something you are hosting
C3	<ul style="list-style-type: none">• You otherwise find hosted material is infringing	i.e. where you become aware from other circumstances that material you host is (likely to be) infringing
D1	<ul style="list-style-type: none">• Owner notification of court ruling re material you index / point to	i.e. where a copyright owner notifies you that a court has ruled material infringing, and you point to it by your index, search engine, etc
D2	<ul style="list-style-type: none">• Owner complaint re material you index / point to	i.e. where a copyright owner objects to something you point to by your index, search engine, etc

Sample

Next, we'll set out the details of each kind of take down.

