



## **Australia-United States Free Trade Agreement – Unauthorised Use of Encoded Broadcasts**

Australian law effectively deters unauthorised decoding of encrypted broadcasts and related activity.

2. Australia has fulfilled its obligations in Article 17.7 of the AUSFTA in relation to encrypted program-carrying signals through amendments to the existing scheme in the *Copyright Act 1968* (the Act). That scheme applies to encoded broadcasts regardless of the method of delivery. In doing so, Australia has gone substantially further than is required by its AUSFTA obligations, capturing cable signals in addition to satellite signals.

3. The amendments to Part VAA of the Act already enacted, and further amendments proposed strengthen the protection of encoded broadcasts by extending the scope of both criminal and civil liability. Criminal liability will now extend to any use of a decoding device to gain access to an encoded broadcast without authorisation where the person uses, or authorises the use of, the broadcast by way of trade or with the intention of obtaining commercial advantage or profit. Criminal liability will also apply to the distribution of an unauthorised decoded signal irrespective of whether the distribution is for commercial advantage or profit. Finally, a further amendment will criminalise the use of a broadcast by way of trade or with the intention of obtaining a commercial advantage or profit where the initial decoding was done by another person without authority.

4. Activity for which civil actions may be brought has also been widened to include:

- use of a broadcast decoding device to gain unauthorised access to an encoded broadcast where the person knew or ought reasonably to have known that the decoding was unauthorised (sub-s 135ANA(1)),
- distribution of a decoded signal where there is a prejudicial impact on a person with an interest in the signal and the person distributing the signal knew that it had been accessed without the broadcaster's authorisation (sub-s 135ANA(1A)), and
- reception of an encoded broadcast (regardless of whether the person receiving the broadcast used a decoding device themselves), where the person knew that the broadcaster had not authorised the access (sub-s 135ANA(1B)).

5. All of these actions in paragraph 4 above will apply to activities that occur in the privacy of the home. This significantly extends the civil remedies under the Act which previously applied only to the use of a decoding device for the purpose of, or in connection with, a trade or business.

6. Standing to seek civil remedies has also been extended to channel providers and any other person with an interest in the copyright in the content of a broadcast. Previously, standing to sue under Part VAA was only made available to broadcasters.

### *Effectiveness of Australia's regime*

7. The pre-existing civil remedy provisions under the Act have acted as an effective deterrent against activity related to the improper use and distribution of decoding devices and the

unauthorised reception of an encoded broadcast – and can only be strengthened by the most recent legislative amendments.

8. The *Report on the Copyright Amendment (Digital Agenda) Act 2000 and related matters*, commissioned from law firm Phillips Fox by the Government, considered whether further amendments were necessary to better protect copyright owners where there had been improper use of broadcast decoding devices. The Report concluded that the Act was working effectively, and recommended only that section 135ANA be amended so as to prohibit the personal use of a broadcast decoding device other than for certain purposes. This recommendation parallels commitments under AUSFTA and has effectively been implemented by Australia's AUSFTA legislation.

9. The civil remedy provisions provide for a court to award damages that are additional to compensation for loss. Under the civil remedy provisions, a court may award additional damages if it is satisfied that it is proper to do so having regard to the flagrancy with which the defendant contravened the relevant provision and the benefit gained from the contravention. Additional damages are to be awarded on principles that correspond to those governing awards of aggravated and exemplary damages at common law (*Raben Footwear Pty Ltd v Polygram Records Inc* (1997) 75 FCR 88). The purpose of such damages provisions is to punish a defendant and to serve one or more objects of punishment, namely moral retribution or deterrence (*Windeyer J in Uren v John Fairfax & Sons* (1966) 117 CLR 118 at 149).

10. There is no indication that the additional damages provisions under the Act are not achieving these objects. Indeed, there have been a number of instances in recent years where substantial amounts have been awarded to plaintiffs in copyright infringement cases using a similar provision in the Act (*Microsoft Corporation v Goodview Electronics Pty Ltd* (2000) FCA 1852 (\$500,000) and *Milpururru v Indofurn* (1994) 54 FCR 240 (\$70,000)). Additional damages can also substantially outweigh the compensatory damages awarded. For instance, in the case of *Raben Footwear Pty Ltd v Polygram Records Inc and Anor* [1997] 370 FCA, \$15,000 was awarded in additional damages, despite only \$275 being awarded in compensatory damages.

11. Further, full costs may be awarded in civil actions before Australian courts. This means that, in addition to damages awarded, a court may order the unsuccessful party to pay the successful party's (often substantial) legal costs. This in itself is likely to pose a substantial deterrent to activity related to the improper use of broadcast decoding devices.

12. The existing case law indicates that injunctive relief to prevent infringing activities relating to broadcast decoding devices has also been utilised with regular success under the Act. Last year, a prominent Australian subscription television operator, Sky Channel, applied for and succeeded in obtaining Anton Piller orders or interlocutory injunctions in four separate cases relating to the use of broadcast decoding devices in businesses (see *Sky Channel Pty Ltd v Darcy's Tavern Pty Ltd* [2003] FCA 19, *Sky Channel Pty Ltd v Intertwine Pty Ltd* [2003] FCA 67, *Sky Channel Pty Ltd v Yahmoc Pty Ltd* [2003] FCA 401 and *Sky Channel Pty Ltd v Palmer* [2003] FCA 1246).

13. Finally, the lower burden of proof applying in civil actions ('balance of probabilities') compared to criminal prosecutions ('beyond reasonable doubt'), provides a greater chance of a successful outcome for copyright interests.