



COMMERCIAL.TELEVISION AUSTRALIA

**SUBMISSION TO THE
JOINT STANDING COMMITTEE
ON TREATIES AUSTRALIA –
UNITED STATES FREE TRADE AGREEMENT
PUBLIC INQUIRY**

**SUBMISSION BY
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EXECUTIVE SUMMARY

CTVA's submission concerns the following aspects of the Intellectual Property Rights chapter of the draft Free Trade Agreement (FTA).

Technological protection measures

- CTVA supports the strengthening of enforcement measures available to copyright owners in the digital context.
- CTVA supports the FTA requirements for legislative change to:
 - impose criminal liability for copyright infringement on a commercial scale, even where there is no profit or profit motive, as is often the case in the online environment;
 - provide increased remedies against circumvention of technological protection measures; and
 - provide increased remedies against misuse of encrypted satellite television broadcasts.
- Increased remedies against misuse of encrypted satellite broadcasts should be implemented in a manner that does not distinguish between satellite and other forms of encrypted television broadcasts.
- The Government should monitor broader developments regarding protection of broadcast content in the digital context and retain flexibility to deal with these developments going forward. Developments of particular interest include the use of "broadcast flags" for digital broadcast content and the potential for widespread copyright infringement via personal video recorders.

Performers' rights

- The FTA requires that Australia grant performers extended rights in sound recordings. CTVA would strongly oppose any extension of performers' rights to audiovisual works.
- Introduction of new performers' rights should not disrupt existing statutory or contractual rights of commercial television broadcasters and should be implemented in a manner that ensures that the rights can be practically managed and complied with.

Retransmission of television signals via the internet

- Retransmission of television signals via the internet is prohibited except with permission from the holders of the rights in the broadcast and the underlying content. However, the Side Letter on Aspects of IP allows this issue to be revisited if the technology available to limit territorial viewing improves.
- CTVA would strongly resist any move to allow internet retransmission of television broadcasts without authorisation.

Online copyright regime

- The FTA regime for dealing with online copyright infringement makes "conduit ISPs" immune from liability for copyright infringement even if they have notice of infringements, and they take no action to prevent or deter those infringements. This effectively provides a loophole for peer-to-peer users sharing infringing content and for infringing content from overseas. Options to close these "loopholes" warrant further consideration.
- CTVA supports a simple and speedy procedure to enable copyright owners to obtain the identity of a user who is infringing copyright from the relevant ISP.

1. INTRODUCTION

Commercial Television Australia (CTVA) is the peak industry body representing all 48 commercial free-to-air television licensees in Australia. CTVA's member groups include the Nine Network, Seven Network, Network Ten, Southern Cross Broadcasting, Prime Television, WIN Television, NBN, Swan Television and Imparja Television.

From an intellectual property perspective, each of CTVA's members:

- is the owner of copyright in a wide range of audiovisual works;
- is a substantial licensor and licensee of copyright; and
- is a licensed broadcaster of commercial television services under the *Broadcasting Services Act 1992* ("BSA").

CTVA welcomes the opportunity to comment on particular aspects of the Intellectual Property Rights chapter of the draft Free Trade Agreement (FTA) which impact on the free-to-air commercial broadcasters.

2. TECHNOLOGICAL PROTECTION MEASURES

The growth of the internet and advances in file sharing technologies have given rise to a fast-growing practice of digital piracy – mass downloading and reproduction of high value digital content. There are already several well-publicised examples of digital reproduction in media markets. The growth of this practice is a pressing economic concern for copyright owners. The potential for economic loss to broadcasters is severe. There is also a pressing social issue concerning the increasing public attitude of disregard for copyright and the impact of this on incentives for content creation.

For some years, free-to-air broadcasters around the world have been concerned that digital broadcast television content does not receive the same level of protection as other copyright subject matter. Once digital free-to-air broadcasts enter the home (through PVRs, PC receiver cards or otherwise), the broadcast content can easily be copied, routed to the Internet, or otherwise be subject to unauthorised distribution through an array of new technologies.

This not only presents a concern to the broadcaster's copyright market, but it also presents a concern for underlying rights holders, who have not authorised their films or other works to be distributed over the Internet. As a result of this threat, if further protection is not given to broadcast content, broadcasters (and underlying rights holders, such as movie studios) may be less willing to make high quality programming available on digital free-to-air television.

CTVA supports the strengthening of enforcement measures available to copyright owners in the digital context. In particular, CTVA supports the FTA requirements for legislative change in the following areas.

2.1. HARMONISATION OF THE LAW RELATING TO CRIMINAL LIABILITY FOR LARGE SCALE COPYRIGHT INFRINGEMENT (ARTICLE 17.11.26)

To the extent that there was doubt on this point under existing Australian law, the FTA requires criminal liability to be imposed where copyright piracy is on a "commercial scale", even where there is no profit or profit motive, as is often the case in the online environment.

2.2. INCREASED REMEDIES AGAINST CIRCUMVENTION OF TECHNOLOGICAL PROTECTION MEASURES (ARTICLE 17.4.7)

The FTA text requires Australia to significantly strengthen the existing remedies against circumvention of technological protection measures (TPMs).

The difficulties of enforcing copyright against unauthorised reproduction means that the primary focus for copyright owners is now on developing technology-based impediments to infringement. Broadcasters have been concerned for some time that the limited circumvention devices and rights management provisions of the Copyright Act are inadequate.

CTVA welcomes the strengthening required by the FTA. In particular, CTVA welcomes:

- extension of the definition of “technological protection measures” to include measures that protect against unauthorised access (FTA text article 17.4.7(b)). The existing definition in the Copyright Act requires that the measure “prevent or inhibit infringement of copyright” and potentially some devices that prevent access do not actually prevent infringement. The proposed extended definition will remove some of the current uncertainty about which devices are protected;
- creation of a criminal and civil prohibition on the act of circumvention (article 17.4.7(a)(i)), as the current law prohibits only commercial dealings in devices.
- extension of the definition of “circumvention device” (article 17.4.7(a)(ii)).
- narrowing of the existing exceptions for “permitted purposes” (article 17.4.7(e) and (f)).

CTVA notes that Australia has a two year period from the date of entry into force of the Agreement to implement its obligations under Article 17.4.6 (Article 17.12). The basis for such a two year delay is not clear and CTVA submits that changes to implement at least the first two points above should be implemented as a matter of priority.

2.3. INCREASED REMEDIES AGAINST MISUSE OF ENCRYPTED SATELLITE TELEVISION BROADCASTS (ARTICLE 17.7)

The FTA also requires the implementation of increased remedies against misuse of encrypted satellite television broadcasts.

Existing Australian law prohibits:

- the manufacture of, and dealing with, broadcast decoding devices (criminal and civil liability) (s135AN); and
- the use of broadcast decoding devices for commercial purposes (civil liability) (s135ANA).

However existing remedies for unauthorised decryption of encrypted television signals are limited to remedies in relation to:

- the use of broadcast decoding devices for *commercial purposes*. There is a gap in the existing protection where individuals, particularly for those outside a commercial broadcaster's licence area, have used broadcast decoding devices to gain unauthorised access to encoded commercial free-to-air broadcasts. CTVA is aware of many instances of this occurring.

- the use of particular kinds of *illegal devices* (eg pirate smart cards). There is a gap in the existing protection where a broadcast is received in a manner not authorised by the broadcaster, but where no illegal broadcast decoding device has been used. For example, use of an authorised set top box outside the contractual conditions under which it is provided.

The FTA requires extension of these remedies, including criminal liability, to include unauthorised acts, including unauthorised reception, in relation to otherwise legal devices. Further, the FTA does not make a distinction between commercial use and private use in relation to unauthorised acts and we believe that the FTA approach is appropriate.

The provision also requires Australia to provide civil remedies in relation to these acts, enforceable by any person injured by the activity, including a person that holds an interest in the encrypted program-carrying signal.

CTVA submits that the legislative changes required by Article 17.7 should be implemented in a manner that does not distinguish between satellite and other forms of encrypted television broadcasts.

2.4. OTHER ISSUES

CTVA submits that, when considering the legislative changes required in relation to TPMs, the Government should also monitor broader developments in the US regarding protection of broadcast content. The Government should retain flexibility to deal with these developments appropriately going forward.

Developments of particular interest include:

- **The “Broadcast Flag”**

Late last year the US Federal Communications Commission (FCC) approved the use of "broadcast flags" for digital broadcast television. The "broadcast flag" is a measure by which digital broadcast content can be protected from unauthorised distribution. It includes a marking on the content as well as specifications for the reception equipment. The FCC order requires that devices that receive digital television broadcasts sold after July 2005 must include content protection technologies approved by the Government.¹

Because of the relative ease of free-to-air broadcasts in one country being received and re-transmitted in a neighbouring country, a common worldwide approach is essential on this issue to adequately protect against the unauthorised distribution of digital broadcast content. Broadcasters around the world agree that a common approach must be adopted internationally on this issue if digital broadcasts are to be protected.

- **Personal Video Recorders (PVRs)**

PVRs currently have the functionality to digitally copy, store and communicate copyright works and subject matter contained in a free-to-air broadcast to other PVRs as well as the Internet and other technologies. One brand of PVR, ReplayTV, features an automatic advertisement skipping functionality on its remote controls. TiVo, another PVR manufacturer, is manufacturing and distributing a PVR that is able to insert its own advertisements into recorded broadcast content, both as

¹ FCC Report and Order and Further Notice of Proposed Rulemaking, MB Docket No.02-230, In the Matter of Digital Broadcast Content Protection, released 4 November 2003.

video files and as "static advertisements" on a paused screen after 20 seconds.

PVR penetration is currently fairly low world-wide. In the United States, less than 2% of homes have a PVR, however some analysts are predicting sharp increases in the growth rate over the next four years. A report from the Yankee Group Media & Entertainment Strategies, forecasts that "by 2007 nearly one fifth of US homes will be able to fast forward TV commercials, eventually disrupting the entire value chain for television"². CTVA submits that as digital television take up increases in Australia, PVR penetration is likely to achieve similar rates over time to those in the US and there are currently three PVR brands available in the Australian market.

In addition, there are also emerging trends in Australia of home networking and media PCs. It is now possible in Australia to buy receiver cards for a PC that allows users to receive free-to-air broadcasts on their PC. Once a broadcast is received by a PC, the user can then copy and store the broadcast, and forward it to the Internet or other users, using email or file-sharing software. This "do it yourself" PVR technology poses an even greater threat to broadcasters of worldwide unauthorised distribution of digital free-to-air broadcasts. CTVA submits that, if unchecked, the future impact of this technology on the Australian free-to-air broadcasting industry could be of a similar scale to that which CD burning and -peer-to-peer file-sharing technology has had on the music industry.

The primary concern of commercial free-to-air broadcasters in relation to PVR technology is the ready access to digital copying and communication of free-to-air broadcasts, once they are digitally recorded by the PVR. Once viewers have digitally recorded free-to-air broadcasts, it is then an easy step to transmit the broadcast to other PVRs, to the internet, or other new forms of technology.

CTVA submits that specific provisions should be included in the Copyright Act to ensure that PVR technology does not go beyond the activities envisaged by the "home-copying" provisions already in the Copyright Act (section 111). CTVA submits that such amendments will ensure that viewers have the opportunity, if they wish, to view the regulated advertisements that are appropriate to the programs surrounding them, and therefore ensure that commercial broadcasters' revenue streams are not jeopardised by the new PVR technology.

CTVA has made detailed submissions on this issue to the Digital Agenda Review being conducted by Phillips Fox Lawyers on behalf of the Commonwealth Attorney-General's Department. CTVA would be happy to provide more information to JSCOT on these issues.

3. PERFORMERS' RIGHTS

CTVA understands that Australia must grant performers' extended rights in sound recordings in order to become a member of the WIPO Performances and Phonograms Treaty (WPPT) and to complete bilateral trade commitments made to Singapore and now the US.

² Quote from Adi Kishore, Yankee Group Media & Entertainment Strategies analyst, cited from Robyn Greenspan, "Remote Power: Can PVRs kill TV Spots?" in www.internetnews.com (22 September 2003).

The WPPT and the FTA require that performers' be granted extended rights in sound recordings only. CTVA would strongly oppose any extension of performers' rights to audiovisual works.

CTVA submits that the introduction of performers' rights in sound recordings should not disrupt existing statutory rights of commercial television broadcasters in sound recordings under the Copyright Act³ and contractual rights under industry agreements with the Phonographic Performance Company of Australia (PPCA).

CTVA submits that legislation to introduce performers rights in sound recordings must ensure that the new category of rights can practically be managed and complied with. The legislation should:

- contain deeming provisions to ensure that performers have no right to challenge the rights of record companies to licence and the right of commercial television broadcasters to use, recordings authorised under current industry arrangements;
- contain a reasonable transition period before makers of recordings are required to obtain express consent from performers in relation to secondary uses of recordings;
- ensure it is possible to assign performers' rights in relation to performances that are not yet in existence; and
- enable performers to give broad consents in relation to use of their performances, to a reasonable extent, to avoid the need to obtain individual releases.

CTVA notes that Australian artists and record companies already have in place a royalty sharing scheme (PPCA's Direct Artist Distribution Scheme). It is essential that the remuneration of musical performances on sound recordings remains a matter between performers and the relevant record companies. CTVA submits that legislation to introduce performers' rights should give statutory recognition to the existing royalty sharing scheme, so that performers are remunerated out of the one fund paid to PPCA by commercial television and radio broadcasters and other copyright users. The addition of a further category of rights-holders does not change the inherent value of the sound recording that television and radio stations use and the creation of another scheme or the addition of another layer to the existing scheme is not warranted.

4. RETRANSMISSION OF TELEVISION SIGNALS VIA INTERNET

The FTA protects the current Australian position in relation to re-transmission of television signals via the internet. Retransmission of television signals via the internet is prohibited without the authorisation of the holder of the rights in both the broadcast and the underlying content. However, the Side Letter on Aspects of IP provides for future consideration of internet re-transmission, if the technology available to limit territorial viewing improves.

The Side Letter provides that:

- from two years after the entry into force of the FTA, either party may request consultations with the other if it considers there has been a significant change in the "reliability, robustness, implementability and practical availability" of technology available to effectively limit the reception of internet retransmissions to users in a specific geographic area; and

³ Including the statutory licence in s109 and the ephemeral copying right in s107.

- the parties must consult and any modifications to the provision prohibiting retransmission over the internet without consent cannot be “unreasonably withheld”.

CTVA does not support any loosening of the current position. The retransmission of free-to-air broadcasts on the internet has at least the following implications.

- Retransmission of broadcasts within Australia, without the permission of underlying rights holders, is permitted by the statutory licence scheme that ensures compensation to those rights holders. However, if a free-to-air signal was transmitted outside Australia via the internet, the Australian rights holders would not be compensated for the use of their work in territories outside Australia.
- Free-to-air broadcasters will typically have commercial arrangements in place that allow them to broadcast underlying material only within Australia.
- The business model of free-to-air broadcasting depends upon the placement of advertising in relation to a particular target audience. The retransmission of a broadcast outside the territory means that the advertising will not reach its intended target.
- To the extent that retransmission by streaming involves making permanent or semi-permanent digital copies of the broadcast material (whether it does will depend upon the technology being employed), copies in digital form are particularly vulnerable to further unauthorised copying and distribution over the internet.

Some of these issues were raised in Australia in the context of the Digital Agenda amendments in 2000, when the statutory licence scheme for retransmissions was introduced. As a result, the Government excluded internet transmissions from the ambit of the statutory licence. These issues remain equally valid today and CTVA would strongly resist any movement to allow internet retransmission without authorisation.

5. ONLINE COPYRIGHT REGIME

The FTA contains a detailed outline of the US regime for dealing with online copyright infringement. The manner in which this will be implemented in Australia is still uncertain at this point.

The provisions of the FTA in this area are detailed and complex and largely mirror the US Copyright Act provisions. CTVA does not propose to comment on the provisions, except to note that there are some areas in which the FTA regime, based on the 1998 US Act, fails to address the reality of current internet piracy.

An example is the approach to ISPs that transmit, route or provide connections between users (called “conduits”). In the FTA there is a broad technological split between “host” ISPs and “conduit” ISPs, which can lead to some anomalous results.

Host ISPs are required to respond to notification of infringements. Conduit ISPs, on the other hand, are immune from liability for copyright infringement even if they have notice of infringements, and they take no action to prevent or deter those infringements.

This is especially significant in at least two scenarios that are becoming more prevalent in the area of online piracy:

- **Peer to peer:** Conduit ISPs provide internet access to peer-to-peer users sharing infringing content. Under the FTA model, these ISPs are not obliged to take any action in response to notifications by copyright owners. Nor are they potentially liable for copyright infringement. This defect in the US legislation has perpetuated the rise of peer-to-peer infringements in the US and should be remedied.
- **Access to international content:** The ISPs that provide connectivity to infringing content from overseas are also conduit ISPs.

CTVA appreciates that these are difficult areas to regulate, but submits that options to close these “loopholes” warrant further consideration.

US law also includes a provision that enables copyright owners to issue a subpoena to an ISP to obtain identifying information in relation to a user who is alleged to be infringing copyright. The FTA does not require the implementation of a subpoena provision in Australia, but it does require that the Government make available an “expeditious” procedure to obtain this identifying information. CTVA supports a simple and speedy procedure.

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