INTERNET service providers will retain access to local "safe harbour" rules that limit liability for customer breaches of copyright under new laws designed to seal the Free Trade Agreement with the US. But, in exchange, ISPs will face the sometime bully-boy tactics of rights holders as the controversial US take-down notice regime is extended to Australia.

Attorney-General Philip Ruddock will introduce the measures – intended to satisfy US demands for tougher intellectual property laws ahead of the start of the FTA on January 1 – in a Copyright Act Amendment Bill to be tabled in the Senate today.

The amendments will "align" Australia's IP property laws with US laws, including the Digital Millennium Copyright Act. Under the DMCA, ISPs are held liable for user infringements of copyright material, and owners can force removal of content by serving take-down notices on providers.

In the US, the regime is under fire as "bounty hunters" acting on behalf of copyright owners flood ISPs with take-down notices generated automatically by software bots that search the internet for alleged infringements.

But local ISPs will be able to take advantage of the "safe harbour" that limits the remedies available for copyright infringements carried out by other persons on their systems or networks – provided the ISP meets certain conditions.

A spokeswoman for Mr Ruddock said ISPs receiving a financial benefit "directly attributable to the infringing material" could not take advantage of the safe harbour scheme. "The bill will also make it clear that ISPs cannot take advantage of the scheme if they know about a copyright infringement and do not expeditiously remove the infringing material," she said.

However, ISPs will not be obliged to scan their networks for infringing material.

"This is a technical bill that does not involve a change in policy or a change in the FTA," she said. "As is currently the case, ISPs will not be required to actively monitor subscriber activity.

"But if an ISP knows, or becomes aware of, infringing material and does not remove it, then the ISP will not have recourse to the safe harbour limits on remedies available to copyright owners."

Local internet service providers are cautious. A Telstra BigPond spokesman said the company had not yet been briefed on the changes, but was keen to understand how take-down notices would work, as well as the impact on safe harbour provisions.

"We'll be reviewing the provisions when the legislation is introduced," he said. An Optus spokesman said US ISPs were "receiving hundreds of thousands of computer-generated take-down notices, many of which are spurious".

Take-down notices set to bite
Karen Dearne
The Australian
NOVEMBER 30, 2004
"We are concerned that the current proposals do not adequately protect against this in the Australian context," he said.

"In addition, it is unreasonable that the industry is expected to comply with very detailed (new) procedures by January 1."

Internet Industry Association chief executive Peter Coroneos said negotiations over the issue had been highly complex, but he was "fairly confident" the Government could achieve a workable balance.

"No-one wants to support piracy, but you obviously don't want to have a situation, as has occurred in America, where you've got automated take-down notices flying left, right and centre," he said.

"These are often inaccurate and the practice is creating a lot of ill-will.

"The notices don't really enhance the position of rights-holders any further than what they already have under Australian law – which everyone recognises as very strong copyright law to begin with."

But Mr Coroneos said there was not a lot of leeway because of the restrictive nature of the text of the FTA agreement.

"The work has been in exploring where the flexibility can be found to create a system that works for us," he said.

"The challenge has been how to accommodate what was agreed on our behalf – not by us, but on our behalf – within the framework of Australian privacy law, legal culture and with regards to the obvious technological challenges the internet presents".

Mr Coroneos said the Government had been very attentive and receptive to industry concerns, "but we won't know how successful we've been until the legislation is tabled in parliament".

Australian Consumers' Association IT adviser Charles Britton said take-down notices were "a recipe for disaster" at both the policy and practical level.

"We have certainly expressed our concerns all the way through the FTA process," he said. "Nobody was listening then, so I guess we're unpersuaded they're listening now."

Mr Britton said the regime "turns the ISP into a policeman of other people's copyright, solely based on some sort of assertion of ownership".

Australian Digital Alliance executive officer Sarah Waladan said the ADA wanted a "fair and equitable safe harbour scheme that isn't overly burdensome on ISPs".

"Our main concern is the potential for rights owners to abuse the system," she said. "Any such scheme has to address the potential for owners to send out spurious take-down notices without reasonable claim to a copyright breach."

Ms Waladan said the ADA also hoped to negotiate a "rebalancing" of user rights under copyright legislation.

The ADA and the Australian Libraries Copyright Committee have called for reforms in the light of the "detrimental impact of the FTA" on libraries, universities, cultural institutions and software developers.
"We are certainly hoping for broader fair dealing provisions as a minimum balancing mechanism for users' interests, but that's not something we're expecting this week," she said.

"This is something we still have to negotiate with the government."

Additional reporting by James Riley

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