

Exchange of Letters on ISP Liability

[Letter from Australia to the United States]

The Honourable Robert B. Zoellick
United States Trade Representative
600 17 Street, NW
Washington, D.C. 20508

Dear Ambassador Zoellick:

In connection with the signing on this date of the Australia – United States Free Trade Agreement (the “Agreement”), the Governments of Australia and the United States reached the following understandings in relation to Chapter Seventeen (Intellectual Property Rights) of the Agreement

In meeting the obligations of Article 17.11.29(b)(ix), Australia will adopt requirements for: (a) effective written notice to service providers with respect to materials that are claimed to be infringing and (b) effective written counter-notification by those whose material is the subject of a notice for removal or disabling, on the basis of a good faith belief that it was issued by mistake or misidentification in accordance with subparagraph (v)(B) as set forth below. Substantial compliance with the elements listed below shall be deemed to be effective written notice or counter-notification.

(I)` Model of an effective notice, by a copyright owner or person authorized to act on behalf of an owner of an exclusive right, to a service provider's publicly designated representative¹.

In order for a notice to a service provider to be compliant with Article 17.11.29(b)(ix), the notice must be a written or electronic communication that includes substantially the following items:

1. The identity, address, telephone number and electronic mail address of the complaining party (or its authorized agent).
2. Information that is reasonably sufficient to enable the service provider to identify the copyrighted work(s)² claimed to have been infringed.
3. Information that is reasonably sufficient to permit the service provider to identify and locate the material that is residing on a system or

¹ It is understood that a representative is publicly designated to receive notification on behalf of a service provider if the representative’s name, physical and electronic address, and telephone number are posted on a publicly accessible portion of the service provider’s website, and also in a public register publicly accessible through the Internet or such other form or manner appropriate for Australia.

² If multiple copyrighted works at, or linked to from, a single online site on a system or network controlled or operated by or for the service provider are covered by a single notification, a sufficiently representative list of such works at, or linked to from, that site may be provided.

network controlled or operated by it or for it, that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled.³

4. A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent or the law.
5. A statement that the information in the notice is accurate.
6. A statement with sufficient indicia of reliability (such as a statement under penalty of perjury or equivalent legal sanctions) that the complaining party is the owner of an exclusive right that is allegedly infringed or is authorized to act on the owner's behalf.
7. The signature of the person giving notice.⁴

(II) Model of an Effective Counter-Notification by a Subscriber⁵ whose material is the subject of a notice for removal or disabling, on the basis of a good faith belief that it was issued by mistake or misidentification.

In order for a counter-notification to a service provider to be compliant with Article 17.11.29(b)(ix), it must be written or electronic communication that includes substantially the following items:

1. The identity, address, telephone number and electronic mail address of the subscriber.
2. Information that is reasonably sufficient to enable the identification of the material that has been subject of a notice for removal or disabling.
2. Information that is reasonably sufficient to enable the identification of the location at which the material appeared at the time of the issue of a notice for its removal or disabling.
3. Statement with sufficient indicia of reliability (such as a statement under penalty of perjury or equivalent legal sanctions) that the subscriber is the supplier of the material and has a good faith belief that the notice for removal or disabling was issued as a result of mistake or

³ In the case of notices regarding an information location tool pursuant to clause (b) (i) (D) of Article 17.11.29 information provided must be sufficiently representative to permit the service provider to locate the reference or link residing on a system or network controlled or operated by or for it, except that in the case of a notice regarding a substantial number of references or links at a single online site residing on a system or network controlled or operated by or for the service provider, a representative list of such references or links at the site may be provided, if accompanied by information sufficient to permit the service provider to locate the references or links.

⁴ A signature transmitted as part of an electronic communication satisfies this requirement.

⁵ All references to "subscriber" in this letter refer to a person whose material is the subject of a notice for removal or disabling by a service provider as a result of an effective notice described in paragraph (a) of this letter.

misidentification. It is understood that the reference to a mistake in this statement could include mistakes as to law as well as to fact.

4. Statement that the subscriber agrees to be subject to orders of any court that has jurisdiction over the place where the subscriber's address is located, or if that address is located outside of the Party's territory, any other court with jurisdiction over any place in the Party's territory in which the service provider may be found, and in which a copyright infringement suit could be brought with respect to the alleged infringement.
5. Statement that the subscriber will accept service of process in any such suit.
6. The signature of the subscriber.⁶

I would be grateful if you would confirm that your government shares these understandings. I have the honour to propose that his letter and your confirming reply be treated as an integral part of the Agreement.

Sincerely,

MARK VAILE

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[Reply from the United States to Australia]

The Honourable Mark Vaile MP
Minister for Trade
Parliament House
Canberra ACT 2600

Dear Minister Vaile:

I have the honour to confirm receipt of your letter of this date, which reads as follows:

“Dear Ambassador Zoellick:

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Sincerely,

MARK VAILE"

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Sincerely,

Robert B. Zoellick

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