AUSTRALIAN
DIGITAL ALLIANCE

# Submission in response to the preliminary report of the

# Australian Competition and Consumer Commission Digital Platforms Inquiry

**February 2019**

The Australian Digital Alliance (ADA) thanks the Australian Competition and Consumer Commission (ACCC) for the opportunity to provide comment on the preliminary report of the Digital Platforms inquiry.

The ADA is a non-profit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy. It was founded following a meeting of interested parties in Canberra in July 1998, with its first patron being retired Chief Justice Sir Anthony Mason AC KBE QC. Its members include universities, schools, disability groups, libraries, archives, galleries, museums, research organisations, technology companies and individuals. The ADA unites those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture.

We will limit our principal comments to the ACCC's proposed recommendation to introduce a mandatory takedown system for digital platforms. The recommendation raises a number of issues of concern for Australia's copyright community. However, we provide short comments on other copyright matters, including website blocking and exceptions, at the end of the submission.

## Contents

## Executive Summary

- The ADA agrees with the ACCC that Australia would benefit from a standardised takedown system for the removal of copyright infringing content posted by third parties to digital platforms.
- However, such a scheme should be introduced through extending the well established safe harbour system which applies to all other service providers in these circumstances, to include all platforms to which the mandatory standards would apply.
- A takedown system which does not incorporate protection against copyright liability will have the illogical outcome that innocent platforms that follow the scheme's requirements and implement best practice tools to deal with copyright infringement could still be liable for the acts of their users.
- The ACCC posits that a platform's compliance with the proposed takedown scheme should provide them with protection under Australia's authorisation scheme. However, the Redbubble case demonstrates that this is unlikely to be the case - it saw a platform found to be liable not only through authorisation but also directly for infringements undertaken by its users, despite having followed best practice takedown procedures.
- The proposal to create an additional and separate takedown scheme, which duplicates and competes with both the Australian safe harbour scheme and the internationally recognised DMCA takedown system, will only serve to add confusion and complexity, reducing the effectiveness and efficiency of these mechanisms for creators and platforms alike.
- Australian platforms are already at a significant disadvantage to their international counterparts due to the lack of a localised safe harbour scheme for their services. The ACCC proposal in its current form will result in Australian based platforms being subject to more complexity, while at the same time increasing their risk of financial liability.
- A number of the statements made in rights holders' submissions appear to indicate that they misunderstand the operation of Australia's current safe harbours, which already include many of the features rights holders are requesting. Most importantly, contrary to claims otherwise, the Australian safe harbour system does provide incentives for the removal of infringing content, as it only provides protection from damages for service providers who remove infringing material found on their platforms in an expeditious manner.
- The ACCC's proposal that the scheme include "measures to develop or update content-matching or unauthorised content identification software" (ie copyright filters) is particularly concerning. Whilst such filters may have a role in preventing infringement when used judiciously, their inability to account for copyright exceptions, such as fair dealing, coupled with the fact that errors still occur and their potential for abuse by bad actors, mean that they are inappropriate as a mandatory industry-wide requirement.
- Furthermore, the mandatory imposition of copyright filters would reduce competition in the sector by significantly advantaging large established platforms who either have such filters in place or the financial means to develop such technology over Australian-based startups and emerging platforms, who are unlikely to have the resources to develop such tools, which are cost prohibitive.

**Recommendation**
We therefore recommend the ACCC follow previous government reports, most notably that of the Productivity Commission's Intellectual Property Inquiry,[1] by recommending that the existing safe harbour system be extended to all service providers, and that a relevant code be created under that scheme to deal with any concerns the ACCC believes would remain outstanding.

## A. Overview

**We support a standardised takedown system**
The ADA agrees with the ACCC's overall conclusion that a standardised, administrative takedown system would be beneficial to both creators and service providers in Australia.

Many of the sectors represented by the ADA have long advocated for the extension of the current safe harbour system, with its takedown procedure, to all online providers, including commercial digital platforms. As you can see from our previous submissions to inquiries such as the Senate Standing Committee on Environment and Communications Legislation Inquiry into the *Copyright Amendment (Service Providers) Bill 2017*,[2] we are particularly concerned with the impact the limited coverage of the current takedown scheme in Australia has on:

- individual creators, who do not necessarily have a clear and consistent process through which to request the removal of infringing content from all online service providers;
- small and medium sized commercial platforms, who:
    - do not have the protections afforded by Australia's safe harbour scheme as their peers in overseas jurisdictions;
    - do not have the resources to develop technological systems to prevent infringing acts by their users and in turn carry greater legal risk; and
- consumers, who are denied the protections provided to them under the statutory safe harbour system, such as a right of review when their material is the subject of a takedown request.

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[1] *Productivity Commission Inquiry Report no.78, Intellectual Property Arrangements* (23 September 2016) Recommendation 19.1 available at http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf.

[2] See Australian Digital Alliance, *Submission to the Senate Standing Committee on Environment and Communications Legislation Inquiry into the Copyright Amendment (Service Providers) Bill 2017* (January 2017) http://digital.org.au/sites/digital.org.au/files/documents/ADA%20service%20provider%20bill%20response%20-%20final.pdf pp.7–8. See similarly the following ADA submissions: on the draft report of the Productivity Commission Intellectual Property Arrangements Inquiry (June 2016) pp13-14 http://digital.org.au/sites/digital.org.au/files/documents/PCIPDraft-ADAsubmission%20-%20final.pdf; on the exposure draft of the Copyright Amendment (Disability Access and Other Measures) Bill (February 2016) pp.11-12 http://digital.org.au/our-work/submission/ada-alcc-joint-submission-exposure-draft-copyright-amendment-disability-access;

The benefits in terms of efficiency and effectiveness of a functional takedown system are well documented.[3] We recognise that the cost of copyright litigation is prohibitive for creators, as is the cost of defending a copyright action for small and medium sized platforms, and agree that an administrative system such as that provided by the existing Australian safe harbour takedown scheme is therefore desirable.

**But it must be part of the existing safe harbour system**

However, we are very concerned with the proposal to create a separate and duplicate system for Australian platforms, rather than working with the well established system that already applies to all other service providers in Australia, and indeed most of the world in one form or another.

The ADA recommends that the ACCC instead follow the example of preceding government reports by recommending that the existing safe harbour scheme set out in ss116AA–116AJ of the *Copyright Act 1968* be extended to all online service providers.

This will finally remove the historical anomaly whereby Australia applies different legal standards to entities providing the same online services, and where Australian commercial platforms are subject to greater risk than their peers in equivalent markets. It would also finally put Australia in compliance with its obligations under the Australia United States Free Trade Agreement (AUSFTA), which requires Australia to apply its safe harbour scheme to all "online service providers".[4]

Creating a takedown system without corresponding safe harbour protection will result in a situation where platforms following industry best practice with respect to dealing with infringing material will still be held financially liable for copyright infringements undertaken by their clients. Such a system would clearly place a heavy legal, regulatory and financial burden on platforms, particularly smaller local platforms, for the benefit of large entrenched rights holders - a burden they will be shouldering without a corresponding legal benefit. It creates a system in which the only way to reduce risk is to relocate off shore or limit the content available on a platform to content for which licences are readily available from large centralised collecting societies, which represents only a small portion of copyright material.

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[3] See, for example, the OECD report *The Role of Internet Intermediaries in Advancing Public Policy Objectives* (4 October 2011) p. 144, available at https://books.google.com/books?id=1HcH18cqJh0C&dq=notice+and+notice+canada&source=gbs_navlinks_s.

[4] Australia United State Free Trade Agreement (2005) Art 17.11.29, available at https://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/chapter-seventeen-intellectual-property-rights.aspx.

## B. Background on Safe Harbours

**History of safe harbours in Australia**

The concept of a copyright safe harbour scheme was first introduced by the U.S. as part of its 1998 Digital Millennium Copyright Act (DMCA) to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age".[5] In line with this goal, the U.S. system was designed to be broad and flexible, to adapt as new technologies and services emerged, and to ensure that anyone providing online services for others could take advantage of it – be they ISPs, libraries, schools, universities or online digital platforms.

The primary purpose of the safe harbours was, and remains, to reduce online infringement by incentivising online service providers to cooperate with copyright holders. As a quid pro quo for receiving the protection afforded by the scheme, intermediaries are expected to comply with certain protocols designed to assist with copyright enforcement online, including takedown procedures. If service providers do not take material down expeditiously, or are otherwise bad actors, they will not receive the legal protection provided by the safe harbours. It is designed as a win-win scheme which provides benefits to rights holders, intermediaries and the economy by:

- creating an efficient administrative system for dealing with infringing content online without the need to resort to expensive legal proceedings;
- protecting the rights of internet users by providing a simple mechanism for responding to inaccurate copyright takedown requests and/or claiming fair dealing rights; and
- providing the legal certainty needed to foster technological innovation.

The safe harbour concept was introduced into Australian law as part of amendments to implement the AUSFTA in 2005.[6] This agreement required Australia to introduce a safe harbour scheme based substantially on the U.S. system, and with the same goals and basic operation. We provide a description of the function of the Australian safe harbour system at Attachment A.

In implementing the AUSFTA, Australia inadvertently limited the coverage of scheme to the narrower term "**carriage** service providers" which is defined by the *Telecommunications Act 1997* as including only commercial ISPs. This makes Australia an anomaly internationally, with no other country having restricted their safe harbours to only certain service providers, as far as we are aware - Canada, Singapore and South Korea (to name a few) all have functional safe harbour systems, and all apply them to all online service providers.[7] This puts paid to any argument that the scheme was never intended to apply to online platforms and marketplaces.[8]

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[5] S. Rep. No. 105-190, at 1 (1998).

[6] *US Free Trade Agreement Implementation Act 2004*, Part 11

[7] See comparison provided by Professor Kimberlee Weatherall, *Internet Intermediaries and Copyright – A 2018 Update*, (February 2018) available at http://digital.org.au/sites/digital.org.au/files/documents/Weatherall%20on%20Internet%20Intermediaries%20and%20Copyright%20-%20Update%20Final.pdf.

[8] We note that FreeTV makes this claim on p.15 of its Supplementary Submission to the ACCC. However, there is no evidence for this being the case, with safe harbours applying digital platforms in all other countries internationally.

This oversight places Australian commercial platforms at a significant disadvantage to their international counterparts, and leaves a gap in the Australian system for managing copyright infringement online, with no clear way to deal with materials hosted by platforms and other service providers other than voluntary measures or litigation. It also puts Australia in breach of its obligations under the AUSFTA, which requires that the safe harbour scheme apply to all providers or operators of facilities for online services or network access, regardless of their nature.[9] Leading academics Professors Jane Ginsburg and Sam Rickertson have noted that the scheme is not only narrower that its DMCA counterpart, it is also "narrower that the obligations in the AUSFTA."[10] The Law Council of Australia has said that extending safe harbours would "correct a long standing error in the law."[11]

Since this initial implementation, consecutive government reports have recommended the extension of Australia's ISP safe harbour scheme to cover all groups providing the same online services. These most recently include:

- The Government's 2014 Online Copyright Infringement Discussion Paper, which expressly agreed with the need to fix the scheme, stating:

  > Adopting the definition of carriage service provider from the *Telecommunications Act* has resulted in entities providing services that fall within the four categories of activity being unable to take advantage of the safe harbour scheme … These entities should be captured by the safe harbour scheme.[12]

- the Productivity Commission's 2016 Report into Australia's Intellectual Property Arrangements, which recommended that Australia expand its safe harbour system to cover all service providers,[13] noting the following benefits:

  > Online service providers, such as cloud computing firms, would face fewer impediments to establish operations in Australia. The copyright system will be more adaptable as new services and technologies are developed, facilitating greater innovation. Aligning with international systems further reduces business uncertainty.[14]

- the 2016 Joint Standing Committee on the Trans Pacific Partnership.[15]

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[9] Australia United State Free Trade Agreement (2005) Art 17.11.29(B)(xii), available at https://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/chapter-seventeen-intellectual-property-rights.aspx.

[10] Jane Ginsburg and Sam Ricketson, "Separating Sony Sheep from Grokster (and Kazaa) Goats: Reckoning Future Plans of Copyright-Dependent Technology Entrepreneurs," 19 Australian Intellectual Property Journal 10, 29-30 (2008).

[11] Law Council of Australia Business Law Section, Online Copyright Infringement Discussion Paper (3 September 2014), https://www.lawcouncil.asn.au/resources/submissions/online-copyright-infringement-discussion-paper.

[12] Attorney General's Department *Online copyright infringement: discussion paper*, 30 July 2014. Available online at https://apo.org.au/node/40630, PRoposal 3, p.7.

[13] See *Productivity Commission Inquiry Report no.78, Intellectual Property Arrangements* (23 September 2016) Recommendation 19.1 available at http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf.

[14] See Productivity Commission, op. cit., p.29. The benefits of expanding the safe harbour system are discussed generally in Chapter 19 of the Report.

[15] See Parliament of the Commonwealth of Australia, *Joint Standing Committee on Treaties, Report 165 Trans-Pacific Partnership Agreement*, Recommendation 4 at 7.28 available at

In 2018, the government again conceded that the safe harbour system should be expanded, but limited the expansion to cultural, education and disability institutions.[16] It cited this as a "first step" in modernising Australia's safe harbour scheme. With respect to extending it to other online service providers, the government undertook to "continue to work with stakeholders on reforms to the safe harbour scheme to ensure it is fit for purpose and reflective of world's best practice."[17] This commitment to further consult on the issue of platforms was endorsed by the Senate Environment and Communications Legislation Committee in its report on the 2018 Bill.[18]

By creating a duplicate and parallel system, the ACCC's proposal runs the risk of bypassing these important recommendations and ongoing discussions on the issue, to the perceived benefit of one group in this debate – large media corporations – rather than resolving concerns regarding the established system in collaboration with all parties, including consumers. In doing so, it conflicts with recent policy decisions made by the Australian parliament to deal with online infringement through the expansion of the existing safe harbour system, rather than the creation of different systems for different service providers.

**Safe harbours are the clearly established international standard**

As discussed above, Australia's current takedown system is based on the AUSFTA, which in its turn is based on the scheme provided under the U.S. Digital Millennium Copyright Act. Requirements similar to the AUSFTA are also contained in other U.S. free trade agreements, including with Chile, Korea and Singapore. As such, the safe harbour system has emerged as the international norm for dealing with intermediary liability not just on procedural matters relating to takedown, but on the provision of clear legal protection for those service providers who comply with the scheme.

This is clearly demonstrated by the report by Professor Kimberlee Weatherall *Internet Intermediaries and Copyright – A 2018 Update*. This report examines the law regarding intermediary liability among 10 comparable markets (Australia, United States, Canada, Singapore, South Korea, United Kingdom, New Zealand, Japan, Israel and the European Union) and concludes that Australia is isolated internationally by not providing its online service providers with protection from liability for copyright infringements undertaken by clients.[19]

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https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TransPacificPartnership/Report_165.

[16] See the *Copyright Amendment (Service Providers) Act 2018*, https://www.legislation.gov.au/Details/C2018A00071.

[17] Senator the Hon Mitch Fifield, Major reform to copyright safe harbour legislation (6 December 2017) available at https://www.minister.communications.gov.au/minister/mitch-fifield/news/major-reform-copyright-safe-harbour-legislation.

[18] Senate Environment and Communications Legislation Committee, *Copyright Amendment (Online Infringement) Bill 2018* - Report (26 November 2018) at 2.56, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/OnlineInfringementBill/Report.

[19] Kimberlee Weatherall, *Internet Intermediaries and Copyright – A 2018 Update*, (February 2018) available at http://digital.org.au/sites/digital.org.au/files/documents/Weatherall%20on%20Internet%20Intermediaries%

The ACCC's proposal to create an entirely new system instead of utilising the recognised international standard would continue to place Australia as an outlier globally, and cement Australian platforms' disadvantage to their international counterparts. Overall, it is those Australian platforms that want to stay in this country and develop better applications and digital platforms, and the creators and consumers that are denied access to them, who will be the losers if the ACCC's proposal is adopted in preference to the expansion of the existing safe harbour laws.

The use of standard or compatible safe harbour systems globally holds a number of benefits. It allows creators and service providers to operate relatively seamlessly across international boundaries, using similar or identical procedures to deal with infringing material regardless of the market in which they are working. Indeed, the vast majority of takedown requests received in Australia are issued using the DMCA standards, and are implemented in Australia following the norms of the US system.[20] International standards also provide a level playing field with respect to the risks for startups wishing to host user generated content (UGC).

As the Weatherall report's traffic light assessment of all 10 markets (see Table 1 below) clearly shows, Australian platforms are missing out on the second of these benefits and being placed at far greater legal risk than their international counterparts, with all comparable countries providing at least some protection against legal liability for those providing common online services, regardless of who the service provider is.[21] This legal risk is not hypothetical, as illustrated by the recent Redbubble decision (see further below).

The system proposed by the ACCC will exacerbate this problem, as Australian startups would not only continue to be subject to uncertainty regarding their legal liability for clients' infringements, but would also become vulnerable to massive fines if they are unable or cannot afford to implement the automatic filtering systems which seem to be the likely outcome of the system proposed by the ACCC (see further below). At the same time, Australian platforms would be required to adopt new takedown policies to comply with the ACMA system, while still complying with the international system for the majority of notices (see further below). The resulting disadvantage to Australian platforms will inevitably damage our technology sector and further motivate platforms to move offshore, or avoid having a physical onshore location.

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20and%20Copyright%20-%20Update%20Final.pdf. In the interest of disclosure please be aware the report was produced with funding from the ADA.

[20] See, for example, description of Redbubble's takedown process in *Pokèmon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 available at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541.

[21] The legal risks faced by Australian intermediaries are examined in detail in Lateral Economics, *Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012) https://lateraleconomics.com.au/wp-content/uploads/2014/01/Excepting-the-Future-Report-to-ADA-Sept-20122.pdf

**Table 1: How risky is internet intermediary business?**[22]

| Country | Providing internet access (IAP) | System level/proxy caching | Hosting (Cloud Computing) | Hosting a user-generated site | Running a search engine or similar |
|---|---|---|---|---|---|
| Australia: carriage service provider | Green | Green | Green | Green | Green |
| Australia: other online service provider | Green | Red | Red | Red | Red |
| *Australia: public sector institutions on passage of Service Provider Bill* | Green | Green | Green | Green | Green |
| United States | Green | Green | Green | Green | Green |
| Canada | Green | Green | Green | Green | Green |
| European Union | Green | Green | Green | Orange | Red |
| United Kingdom | Green | Green | Green | Orange | Red |
| New Zealand | Green | Green | Green | Orange | Red |
| Singapore | Green | Green | Green | Green | Green |
| Japan | Green | Green | Red | Red | Green |
| South Korea | Green | Green | Orange | Orange | Orange |
| Israel | Green | Green | Orange | Orange | Orange |

Red = activities involve a high risk of liability for copyright infringement
Orange = legal situation is unclear, some risk
Green = low or non-existent risk of copyright infringement

[22] Extracted from Kimberlee Weatherall, Internet Intermediaries and Copyright – A 2018 Update, (February 2018) available at http://digital.org.au/sites/digital.org.au/files/documents/Weatherall%20on%20Internet%20Intermediaries%20and%20Copyright%20-%20Update%20Final.pdf

## C. Response to Claims re Authorisation

**Australia's authorisation law is strong and does not need clarification**

The ACCC's summary of authorisation law focuses on the 2012 case of *Roadshow Films Pty Ltd v iiNet Ltd*[23] (iiNet case) as the primary precedent on authorisation law in Australia. This is understandable, due to the emphasis placed on this case by rights holders in their submissions, where they argue that it provides evidence that the Australian authorisation system does not apply sufficient liability to service providers.[24]

However, *Pokèmon Company International, Inc. v Redbubble Ltd*[25] (Redbubble case) is both the more recent case and the more relevant. The iiNet case related to the ability of ISPs to control the use of peer-to-peer software by their users. The principal argument put forward by rights holders was that iiNet should have been found to have authorised infringement because it had failed to terminate accounts based on repeated allegations of infringement from rights holders. The case provides no commentary on takedowns or the liability of platforms for user generated content hosted on their services. In contrast, the Redbubble case deals directly with the liability of platforms for infringing content uploaded by their users, and Redbubble's takedown policies and procedures were central to the case. A close reading of Redbubble discredits claims by rights holder groups that authorisation law in Australia needs to be strengthen. In any event, even before the decision in Redbubble, Australia's authorisation laws were still considered strong and stronger than in comparable countries such as the United States.[26]

It is worth revisiting the facts of the Redbubble case. Australian startup Redbubble, a design marketplace listed on the ASX, was sued by Pokèmon for copyright content uploaded to the Redbubble marketplace – the precise circumstances that the safe harbour scheme is designed to deal with. As soon as Redbubble became aware of the material (through notification by Pokèmon) it removed it. Pokèmon chose to sue the company anyway, taking advantage of the gap in Australian law that leaves platforms vulnerable. If Redbubble were a commercial ISP or operated in another relevant country, it would have been protected from an action for damages. As an Australian-based platform they had to go through lengthy and expensive copyright proceedings to defend themselves, even though they immediately removed the material in question on notification.

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[23] *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16, http://eresources.hcourt.gov.au/showCase/2012/HCA/16.

[24] FreeTV, for example, claims that "The current authorisation infringement provisions are not working in the online environment as they were intended to" - Free TV Australia, Supplementary Submission, Australian Competition & Consumer Commission Digital Platforms Inquiry (September 2018) p.14

[25] *Pokèmon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 available at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541.

[26] See Dr Rebecca Giblin's paper Authorisation in context – Potential consequences of the proposed amendments to Australian secondary liability law, commissioned by the ADA (August 2014)

Most importantly, Redbubble did not avoid liability under Australia's authorisation law for this activity, but was found by the court to have authorised the infringement. This is despite the fact that the court explicitly stated that Redbubble was a good actor, which had done all that it could to address piracy on its service:

> In the present case it may be assumed, as is clearly established from the facts, that Redbubble ... took conscious, considered and reasonable steps, both proactively and responsively, to prevent infringements and to prevent the continuation of infringements.[27]

Yet the court still found itself with no other option under the existing law than to find the company liable for the actions of its users.

Further, Redbubble was not only found to have authorised the infringements undertaken by its users – it was also found to be directly liable for infringements as it had both communicated the material in Australia (eg when the material was reproduced on its website in response to an online search) and offered it for sale. This is despite the fact that these activities were initiated by users and completed automatically, with sales being made from directly by users to customers and only technically facilitated by the Redbubble platform. Unfortunately, the lack of a general exception for ordinary processes necessary to facilitate a communication, such as caching, indexing and RAM reproductions, in Australia makes our intermediaries particularly vulnerable to such findings of direct infringement.[28] Here the court explicitly distinguished the activities of Redbubble as a host of UGC from websites merely providing links to material and ISPs facilitating peer-to-peer technologies, both of which had been found not to be directly liable for activities initiated by their users in previous cases, including iiNet.[29]

The Redbubble case makes it clear that, contrary to rights holders' claims, Australian authorisation law does not need to be reformed to impose greater levels of liability on third party intermediaries, or as the ACCC puts it, to address "the difficulty and lack of clarity in the operation of authorisation liability."[30] The Redbubble case instead proves that current Australian law already clearly makes platforms liable for authorising copyright infringements carried out by their users – and, indeed directly liable for communications and sales initiated and made by users. It also makes it clear that this double liability will apply even where those platforms follow industry best practice in taking the material down expeditiously once they become aware of it.

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[27] *Pokèmon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 available at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541, para 67

[28] Although s43A of the *Copyright Act 1968* provides a defence for temporary reproductions made in the course of a communication, this does not apply to infringing communications, meaning that service providers can still be held directly liable for reproductions undertaken as part of the technical process of infringing communications initiated by their users.

[29] See *Pokèmon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 available at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541, para 48. The relevant previous cases are *Roadshow Films Pty Ltd v iiNet Ltd* (No 2) (2012) 248 CLR 42 and *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1

[30] Australian Competition and Consumer Commission, *Digital Platform Inquiry - Preliminary Report* (December 2018) p.157

The ACCC notes that the amount of damages in the case was limited to $1, and states that this shows that "successful copyright litigation can lead to substantial net loss for the plaintiff."[31] However, the low level of damages, as the judicial decision makes clear, was not because of a failing in authorisation liability, but rather due to a lack of evidence by Pokèmon as to actual financial damage caused.[32] This is a well established principle of Australian common law, which would not be affected by changes to authorisation law or the safe harbour scheme. The court had the option to award special damages, and indeed was asked to do so by Pokèmon, but chose not to do so specifically because Redbubble was a good actor.[33] Furthermore, Redbubble was also ordered to pay 70% of the plaintiff's court costs, and so was effectively penalised hundreds of thousands of dollars – despite being a good actor and following best practice takedown procedures.

**The Redbubble case shows why safe harbour protection is needed**

Why Pokèmon sued Redbubble, when the material had been removed as requested, remains a mystery. However, it shows how a large well resourced multinational rights holder can easily target an Australian platform through copyright infringement cases with, for example, the aim of putting them out of business. Without the legal certainty offered by a safe harbour scheme to provide protection once material is taken down, Australian platforms will remain vulnerable to such attacks.

The Redbubble case also counters the ACCC's suggestion that a mandatory takedown scheme will provide benefits for platforms in the form of "a reduction in the likelihood of being found liable of authorising an infringement."[34] This is because:

- it makes it clear platforms may be found liable under our authorisation laws even where they have followed best practice in taking material down expeditiously; and
- regardless of whether they receive some benefit in an authorisation determination, a platform can still be held directly liable for infringements initiated by their users, due to the lack of exceptions for technical processes undertaken by intermediaries in the course of facilitating a communication in Australia.

Similarly, FreeTV's claim that "if they comply with the authorisation infringement provisions and any industry codes developed under those provisions of the Act, the platforms would be unlikely to be found responsible for copyright breaches on their platform"[35] does not hold in a system in which platforms can equally be found to be directly liable for copyright infringement on their systems. Courts do not consider codes of conduct or whether reasonable steps were taken to

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[31] Australian Competition and Consumer Commission, *Digital Platform Inquiry - Preliminary Report* (December 2018) p.144

[32] See *Pokèmon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 available at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541, para 74

[33] See *Pokèmon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 available at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541, para 76

[34] Australian Competition and Consumer Commission, *Digital Platform Inquiry - Preliminary Report* (December 2018) p.160

[35] Free TV Australia, *Supplementary Submission*, Australian Competition & Consumer Commission Digital Platforms Inquiry (September 2018) p.16

prevent infringement in determining direct liability. The existing safe harbour scheme provides protection under both authorisation and direct liability specifically for this reason.

This makes it clear that any takedown scheme must go hand in hand with legal protection for service providers who comply with the scheme, both for actions for authorisation and direct infringement. Otherwise, we will end up with a system whereby Australian-based platforms will follow the mandatory takedown procedures as proposed, and still be subject to expensive litigation at the discretion of rights holders. This is clearly an undesirable outcome and reduces incentives for compliance with any code by platforms. Perhaps even more alarmingly, it reduces the incentive for platforms to operate out of Australia.

Redbubble shows that without the protection provided by the safe harbour, compliant service providers will still be subject to substantial legal risk simply for operating in Australia and/or be forced to pay hundreds of thousands of dollars in costs defending their day-to-day operations. In fact, the legal risk for Australian-based platforms will be heightened under the ACCC proposal, as they will have the additional risk of being fined under the mandatory code if for some reason they are unable to comply, even despite their best efforts.

It is therefore essential that Australian platforms receive clear and unequivocal protection under a safe harbour scheme once they have taken material down, and are not left vulnerable to copyright claims even where they follow industry best practice.

## D. Response to Claims re Safe Harbours

**Rights holders misunderstand the operation of the safe harbours**
A number of the statements made by rights holders in their submissions to the ACCC seem to indicate a misunderstanding of the operation of safe harbours. Indeed, a number of the concerns and objections they raise in arguing against the extension of the safe harbours to digital platforms are already dealt with under Australia's existing safe harbour system.

For example, in its supplementary submission to the ACCC, FreeTV lists a number of features they argue are required to improve Australia's takedown scheme and incentivise the removal of pirated material – features which, as Table 2 below demonstrates, are already part of the Australia's safe harbour system. Digital platforms have no objection to these measures remaining in the system were it to be extended to them.

**Table 2: FreeTV proposals – comparison with Australian safe harbour scheme**

| FreeTV proposal | Requirements under the *Copyright Act* |
|---|---|
| Legal framework must provide "concrete obligations on service providers to remove infringing material" – B.5.2<br><br>The infringing material must be taken down "expeditiously"– B.3.2.1 | To receive protection under the scheme "the service provider must **expeditiously remove or disable access to copyright material** residing on its system or network" – s116AH(1) Item 4, 2-2A<br><br>To be clear – if hosting services do not expeditiously remove infringing material, they are excluded from the safe harbour and receive no legal protection. |
| "Where a service provider is aware of an infringement and it is within the power of a service provider to take reasonable steps to prevent that infringement, the service provider should be required to take those steps." – B.4.3 | Removal must occur upon receipt of a notice from the copyright owner; or **once the platform becomes aware** that the material is infringing; or once the platform becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing – s116AH(1) Item 4, 2-2A |
| That platforms must have and apply policies for termination of access by repeat infringers – B.3.2.2 | The service provider **must adopt and reasonably implement a policy that provides for termination**, in appropriate circumstances, **of the accounts of repeat infringers**. – s116AH(1) Item 1 |
| Platforms must not be able to access safe harbours if they are providing or selecting infringing content for a use. – B.5.2 | The safe harbours for storage and caching apply only when the activity is "**at the direction of a user**" – ss116AD and 116AE<br><br>Similarly, the safe harbour for transmitting material applies only when the transmission is **initiated by or at the direction of a person other than the service provider** – s116AH Item 2.1 |
| Platforms must not be able to access safe harbours if they are commercially gaining from making infringing content available. – B.5.2 | When hosting or linking to infringing material, the service provider **must not receive a financial benefit that is directly attributable to the infringing activity** – s116AH(1) Item 4.1 and Item 5.1 |

As the above clearly demonstrates, it is patently false to claim the safe harbours "protect service providers from legal remedies available to rights-holders for copyright infringement, regardless of whether they:

- contributed to that infringement; or
- took reasonable steps available to them to remove pirated material from their networks."[36]

The Australian safe harbour scheme only provides legal protection for infringements undertaken by third parties (not the service providers themselves) and only if the material is removed expeditiously as soon as the platform becomes aware of it.

**Rights holder concerns are better addressed within the existing system**

A number of the concerns raised in rights holder submissions essentially amount to questions about the implementation of the standards set by the safe harbours. For example, what amounts to expeditious in the context of live streams? Are platforms are appropriately implementing their repeat offender policies? Comments by Foxtel seem to indicate that at least in a number of cases these were teething problems which have been resolved through negotiation and collaboration.[37]

However more importantly, these points do not provide an argument for the exclusion of platforms from the safe harbour scheme, or for the introduction of a separate competing system for platforms alone. Rather, they go to interpretation or enforcement of the existing standards. This is especially the case as it appears from FreeTV's submission that they propose the duplicate scheme would apply almost identical standards to those of the existing scheme, as Table 2 above makes clear.

These concerns would therefore be better addressed by the development of a code of practice to clarify the operation of the standards provided by the existing safe harbour system. Indeed, Australia's safe harbour scheme contemplates the creation of such a code[38] and the Australian *Copyright Regulations 2017* were recently amended to clarify the process for developing this code, and the content it should contain.[39]

**Safe harbours provide incentives for platforms to take material down**

Rights holders' submissions repeatedly make the claim that the structure of the safe harbour system removes incentives for service providers to takedown material. For example, FreeTV claims that extending the safe harbour to platforms "would remove any incentive for Google or Facebook to remove infringing content and to work with rights holders to reduce online piracy"[40]

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[36] Free TV Australia, *Supplementary Submission*, Australian Competition & Consumer Commission Digital Platforms Inquiry (September 2018) p.16

[37] See Foxtel and Fox Sports, *Response to the Australian Competition and Consumer Commission's Digital Platforms Inquiry Issue Paper* (April 2018) p.11

[38] *Copyright Act 1968* s116AH Item 1.2

[39] See discussion of the changes at https://www.communications.gov.au/have-your-say/consultation-draft-copyright-amendment-service-providers-regulations-2018

[40] Free TV Australia, *Submission*, Australian Competition & Consumer Commission Digital Platforms Inquiry (April 2018) p.44

and that “by removing the legal risks associated with such infringing material, it would disincentivise the platforms from removing it.”[41]

We are confused by this statement. The statement ignores the fact that service providers *only* receive protection under the safe harbours if they remove the infringing material expeditiously once they become aware of it. In fact, motivating the quick removal of infringing content from their services is one of the primary purposes of the safe harbour system. There have been a number of international cases where platforms have been excluded from protections under equivalent safe harbour schemes because they failed to meet this standard.[42]

**Licences with rights holders are helpful, but do not provide a complete solution**

Australian rights holders have in the past stated that their primary objection to extending the safe harbour scheme to platforms was that it would “reduce the incentives for such entities to enter into commercial agreements with copyright owners.”[43] However, international experience demonstrates that this is not true. Both Facebook and YouTube operate under the U.S. safe harbour scheme, and have independently entered into extensive and lucrative licences with rights holders.[44] This demonstrates that there is clearly motivation for service providers to enter into commercial arrangements with rights holders even in countries that provide safe harbour protection – when those licences are available.

More importantly, licences do not provide a functional alternative to legislative protection for platforms that allow UGC to be uploaded. Rights holders arguing to improve their licensing position act as though this is a two party system – a single large rights holder dealing with a single large platform. But this is not the case – only a small portion of the huge swathes of material being uploaded to platforms every day is managed by known licensing entities. Platforms would therefore have to track and reach agreements with the owners of millions of pieces of content which are uploaded to their services were they to seek to replace safe harbour protection with licensing. This is an impossible task.[45]

Even where platforms have licences with the major collecting societies, record labels, television companies and news organisations, an even larger portion of the material uploaded by individual creators and members of the public will not be covered by a licence. Without a safe

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[41] Free TV Australia, *Supplementary Submission*, Australian Competition & Consumer Commission Digital Platforms Inquiry (September 2018) p.16

[42] See, for example, *BMG Rights Mgt. v. Cox Communications, Inc*., 882 F.3d 291 (4th Cir. 2018), and *Michael Grecco Productions v. Valuewalk LLC*, 345 F.Supp.3d 482, 508 (S.D.N.Y. 2018)

[43] Australian Performing Rights Association, Submission to the Productivity Commission review of Australia’s Intellectual Property Arrangements, sub.DR404, p.14 available at

[44] Google, for example, reports that YouTube has paid out over $6 billion in total ad revenue through licences to the music industry, including $1.8 billion from October 2017 to September 2018 - Google, *How Google Fights Piracy*, (November 2018) p.21 available at https://www.blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf.

[45] Lateral Economics examines the potential transaction costs of trying to license intermediary use of copyright in Chapter 3 of the Lateral Economics, *Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012) https://lateraleconomics.com.au/wp-content/uploads/2014/01/Excepting-the-Future-Report-to-ADA-Sept-20122.pdf

harbour, they will still be subject to uncontrollable legal risk with respect to this material. In short, the current legal framework in Australia, and the one proposed by the ACCC, is antithetical to UGC platforms.

**Rights holders will always need to be involved in takedown processes**

One of the criticisms of the current safe harbour takedown system raised by rights holders is that it requires rights holders to identify their content to the platforms. The suggestion seems to be that platforms should, instead, be the ones required to identify content as infringing.

We note, for example, that in its submission Foxtel criticises the current takedown process applied by Facebook because it "involves an investment of time and resources on the part of rights holders, who were required to provide a copy of the content and proof of copyright ownership."[46] FreeTV similarly argues that "the evidentiary burden on proving copyright ownership is often time consuming and onerous (particularly given there is no registration process for copyright ownership in Australia as there is in the US), requiring copies of copyright content to be uploaded to the digital platforms rights management system."[47] On a similar note, Foxtel complains of difficulties that it faces in getting rights holders to enforce geographic limits in their contracts with other licensees[48] - a matter that is clearly between Foxtel and the relevant rights holder. It would be be entirely inappropriate for any platform to remove content from their services based on the views of a third party who did not have the authority to act on behalf of the rights holder, albeit that is what Foxtel appears to suggest

These criticisms ignore the fact that it is impossible for platforms to know what is infringing without input from the rights holder, as it is impossible for the platforms to know what commercial arrangements are in place between various rights holders around the world. Copyright material may be licensed to any number of creators for different uses in different regions at different times. It will therefore always be necessary for rights holders to take a major role - and expend some time and resources - in working with platforms to identify infringing content.[49]

As shown below, even takedown notices issued by rights holders, either through automated systems or manually, frequently target legitimate websites and content.[50] Requiring platforms to decide for themselves what material is infringing to "ease the burden" on rights holders will only heighten this effect.

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[46] See Foxtel and Fox Sports, *Response to the Australian Competition and Consumer Commission's Digital Platforms Inquiry Issue Paper* (April 2018) p.11

[47] Free TV Australia, *Supplementary Submission*, Australian Competition & Consumer Commission Digital Platforms Inquiry (September 2018) p.10

[48] See Foxtel and Fox Sports, *Response to the Australian Competition and Consumer Commission's Digital Platforms Inquiry Issue Paper* (April 2018) p.11

[49] This point was contemplated by the US government when it first designed the DMCA provisions, and has arisen in cases under the DMCA law. See discussed in Evan Engstrom and Nic Feamster, *The Limits of Filtering: a Look at the Functionality and Shortcomings of Content Detection Tools* (Engine, March 2017) pp.3-5, available at https://www.engine.is/the-limits-of-filtering/

[50] See, for example, *DMCA Mystery: Did Epic Games Send a Takedown to Itself?* (EFF) available at https://www.eff.org/takedowns/dmca-mystery-did-epic-games-send-takedown-itself

## E. Response to comments about filters

**Filters are not substitutes for a functioning takedown scheme**

We note that the ACCC has specifically proposed that its mandatory code include "measures to develop or update content-matching or unauthorised content identification software" ie content filters. Rights holder submissions also argue for platforms to be required to adopt copyright filters which enable them to proactively police their user contributions, not to takedown copyright material but rather to prevent it being uploaded in the first place.[51]

However, making such technologies mandatory as rights holders propose is not desirable or workable. Requiring small startups to adopt such technologies from the outset places a cost and technological burden on them that will prevent them from developing or competing in the marketplace. Rights management technologies are extremely difficult and costly to develop and apply, and YouTube and Facebook have have spent hundreds of millions of dollars on the development of theirs tools.[52] Filters also hold a significant risk of error and abuse (see further below). As a result, they will either be out of reach of most smaller and emerging platforms, or poorly executed to the extent that the services lose their utility. Thus imposing mandatory filter requirements on all service providers will have the consequence of further securing the dominance of existing large platforms, rather than reducing it. It will also further penalise Australian-based digital platforms compared to their international peers.

Furthermore, filters have the same practical disadvantage as licences in terms of the scope of material they are able to cover. Platforms rely on rights holders to accurately and comprehensively identify the works they own. Accordingly, for filters to provide a complete solution, the digital platforms would need accurate and comprehensive input from tens of millions of copyright owners globally. This is of course entirely unrealistic.

**Filters can be helpful, but they also have limitations**

Filtering systems used by YouTube and Facebook can and do have an important role to play in helping content owners manage if and where their content appears on YouTube and Facebook. However, these systems have limitations. For example:[53]

- Incorrect use of filters - and automated takedown requests - commonly results in the shutdown of legitimate websites. The authorised pages of famous musicians including

[51] See Free TV Australia, *Supplementary Submission*, Australian Competition & Consumer Commission Digital Platforms Inquiry (September 2018) pp. 17 & 18.

[52] YouTube, for example, reports that it has invested over $100 million in developing its Content ID technology - Google, *How Google Fights Piracy* (November 2018) p.27 available at https://www.blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf.

[53] Documentation and analysis of the problems encountered with internet filters can be found in numerous publications, including: Kristofer Erickson and Martin Kretschmer (2018), 'This Video is Unavailable': Analyzing Copyright Takedown of User-Generated Content on YouTube, *Journal of Intellectual Property*, Information Technology and E- Commerce Law (JIPITEC), 9(1) available at https://www.jipitec.eu/issues/jipitec-9-1-2018/4680; Thomas Margoni (2018) *Why the incoming EU copyright law will undermine the free internet* https://theconversation.com/why-the-incoming-eu-copyright-law-will-undermine-the-free-internet-99247

Beyoncé and Bruno Mars, fundraising pages and even newspaper articles have all been blocked in the last year.[54]

- Filters cannot recognise legitimate use under copyright exceptions such as fair dealing. For example, a lecture by prominent copyright expert Professor Lawrence Lessig explaining the concept of fair use was taken down by YouTube's Content ID system,[55] as was a political commentary on Martin Luther King Jr's "I have a Dream" speech (with the claim coming from Sony, not from Dr King's family).[56] Similarly, a live stream of a conference was cut off when attendees began to sing happy birthday.[57]
- Filters frequently make errors, such as falsely identifying public domain material such as whitenoise,[58] Bach's compositions[59] or even birds chirping[60] as protected by copyright. Indeed, one music professor who undertook an active campaign to work through official systems to upload public domain music found he was unable to lift limits on many videos;[61]
- Automated systems are deliberately abused to extort creators,[62] silence critics[63] and damage competitors[64] by some bad actors.

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[54] See Daniel Nazer, *Topple Track Attacks EFF and Others With Outrageous DMCA Notices*, (EFF, 9 August 2018) available at https://www.eff.org/deeplinks/2018/08/topple-track-attacks-eff-and-others-outrageous-dmca-notices.

[55] See Eriq Gardner, *Lawrence Lessig Sues Over Takedown of YouTube Video Featuring Phoenix Song* (Yahoo Entertainment, 23 August 2013) available at https://www.yahoo.com/entertainment/news/lawrence-lessig-sues-over-takedown-youtube-video-featuring-050000789.htm

[56] *Sony takedown over Martin Luther King speech* ((DMCA Horror Stories, 2016) https://www.takedownabuse.org/stories/sony_vs_fight_for_the_future/

[57] See Tim Cushing, *YouTube Kills Livestream Of Convention When Audience Starts Singing 'Happy Birthday'* (Techdirt, 15 October 2013) https://www.techdirt.com/articles/20131014/15323524876/youtube-kills-livestream-convention-when-audience-starts-singing-happy-birthday.shtml

[58] See Paul Donoghue, *Musician hit with copyright claims over 10 hours of white noise on YouTube* (ABC News, 10 January 2018) https://www.abc.net.au/news/2018-01-10/white-noise-youtube-copyright-infringement/9314858

[59] See *Sony Finally Admits It Doesn't Own Bach and It Only Took a Bunch of Public Pressure* (EFF) available at https://www.eff.org/takedowns/sony-finally-admits-it-doesnt-own-bach-and-it-only-took-public-pressure

[60] See Nancy Messieh, *A copyright claim on chirping birds highlights the flaws of YouTube's automated system* (TNW, 28 February 2012) https://thenextweb.com/google/2012/02/27/a-copyright-claim-on-chirping-birds-highlights-the-flaws-of-youtubes-automated-system/

[61] See Carl Bode, *This Music Theory Professor Just Showed How Stupid and Broken Copyright Filters Are* (Motherboard, 31 August 2018) https://motherboard.vice.com/en_us/article/xwkbad/this-music-theory-professor-just-showed-how-stupid-and-broken-copyright-filters-are

[62] See Laurence Adams, *New Scam Holds YouTube Channels for Ransom* (Bleeping Computer, 2 February 2019) https://www.bleepingcomputer.com/news/security/new-scam-holds-youtube-channels-for-ransom/

[63] See Adam Steinbaugh, *Ares Rights Continues Questionable DMCA Censorship For Ecuador, Targets Chevron* (13 December 2013) http://adamsteinbaugh.com/2013/12/13/ares-rights-dmca-chevron-censorship-ecuador/. See more discussion of abuse of takedown filters at Cory Doctorow, *How the EU's Copyright Filters Will Make it Trivial For Anyone to Censor the Internet* (EFF, September 11 2018) https://www.eff.org/deeplinks/2018/09/how-eus-copyright-filters-will-make-it-trivial-anyone-censor-internet

[64] See Anita Campbell, *Fraudulent DMCA Takedown Requests: Finally, a Lid on Them?* (Small Business Trends, 26 December 2018) https://smallbiztrends.com/2015/05/fraudulent-dmca-takedown-requests.html

The digital advocacy group Electronic Frontiers Foundation[65] and Fight for the Future[66] both maintain archives documenting many more cases of inaccurate or inappropriate takedown due to automated filters and notices.

While some of these problems can also occur under safe harbour schemes (especially when automated notices are used - which account for the vast majority of notices issued by rights holders globally) their impact is far more severe under a filter because the material is automatically blocked and prevented from being uploaded in the first place. As the vast majority of filter blocks and takedowns are not challenged, this will result in a swathe of material disappearing from the internet. This is why, for example, filters are often labeled internationally as "meme killers," with legitimate uses prevented entirely by a system intended to take aim only at piracy.[67]

**Platforms have good reason to be cautious about how they apply filters**

When material is inaccurately claimed by rights holders using filtering technologies, it can have far reaching effects. As the above examples show, this can be a result of deliberate abuse by a rights holder, but is more often due to a misunderstanding of their rights to the content in question, or of copyright law. The complicated rights associated with copyright makes it extremely difficult to apply filters, and there is substantial confusion among creators about how copyright law works and what is legally permitted.[68] Not only must issues such as fair dealing be considered; there are also frequently multiple, and sometimes even competing, claims to exclusive rights over content. Different rights in the same material are often licensed to different entities, such as on a region by region basis.

**The impact in Australia will be worse due to our lack of fair use**

We note that the negative effect of inaccurate filters is likely to be even greater in Australia, as there is no fair use exception that can be used to challenge takedowns. The Chair of the ACCC, Rod Sims, has written in the past about the importance of introducing fair use to align our law with reasonable consumer behaviours and expectations.[69] Many uses of copyright material, such as posting a video of your child dancing to popular music in the kitchen, or sharing a meme, are technically illegal in Australia because there is no exception to cover them, but generally continue as "tolerated uses" ie uses for which rights holders choose not to issue takedown notices. Such tolerated uses will be automatically caught by filters, and without a defence under copyright law cannot easily be restored.

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[65] https://www.eff.org/takedowns

[66] https://www.takedownabuse.org/

[67] See, for example, Gian Volpicelli, *The EU has passed Article 13, but Europe's meme war is far from over* (Wired, 14 September 2018) available at https://www.wired.co.uk/article/eu-article-13-passed-meme-war

[68] See Kylie Pappalardo, Patricia Aufderheide, Jessica Stevens and Nicolas Suzor, *Imagination foregone: A qualitative study of the reuse practices of Australian creators*, 2017, https://eprints.qut.edu.au/115940. In the interest of disclosure please be aware the report was produced with funding from the ADA.

[69] Rodd Sims, 'Fair use copyright reforms essential in a world of technological change', *Sydney Morning Herald*, 29 May 2017 available at https://www.smh.com.au/opinion/fair-use-copyright-reforms-essential-in-a-world-of-technological-change-20170529-gwfb0i.html

## F. Impact on Competition

**The ACCC proposal will reduce competition**
The lack of a safe harbour, coupled with expensive and targeted copyright infringement cases is also a way that entrenched rights holders can reduce competition amongst platforms for the supply of content.

Despite the focus of the ACCC report being on the impact of large international platforms such as Facebook and YouTube on local media, it is not these established players who will be most affected by the new system, but rather the Australian startups seeking to compete with them. Both Facebook and YouTube already have licences and filters in place, and are world leaders in this respect. Most, if not all, Australian-based startups and services will not be able to afford the high cost of developing their own filters. The biggest impact of a policy which increases the legal risks for platforms, adds regulatory compliance costs and requires the adoption of filters will therefore be to further entrench the advantage the large platforms have over fledgling competitors.

Furthermore, a system as proposed by the ACCC, which applies liability to service providers even when they are good actors and remove material expeditiously would force them to only distribute content from large content owners from whom licences can be obtained at the expense of small individual creators, including the thousands of individual Australian creators who are producing content and building businesses on platforms like YouTube and Redbubble. The result will be an internet that serves only large media players, and a far less rich creative and information landscape.

## G. Practical problems with the ACCC proposal

**Two separate takedown systems will create confusion and increase costs**
Creating a separate takedown system that applies only to commercial digital platforms would lead to an extremely confusing and inefficient system for dealing with infringing material in Australia. It would require individual creators and consumers to navigate a far more complex system whereby they are expected to understand the difference between requesting takedown when their materials are shared on a platform versus when they are shared on an ISP hosted website. They would also be required to understand the difference in requesting/challenging takedown when their material is on an Australia platform versus an overseas platform.

Assuming the new ACMA system does not align with existing international norms – which can be presumed, or the existing safe harbour would suffice – creators and platforms alike will be required to comply with two separate systems: the custom Australian system, and the international standard DMCA system, through which most notices will continue to be served. This is less likely to affect large rights holders, who often outsource copyright notifications to external companies that work with automated systems, or large platforms who already have

expensive and well established technologies and processes for taking down material and will be more easily able to develop new ones to comply with the custom Australian system. However, for smaller rights holders seeking to chase material manually or smaller startups seeking to enter the space, the increased complication and red tape will become a major barrier to entry.

It is also unclear what the situation will be for companies such as Telstra, which operate in both the ISP and media delivery space, or for organisations that provide platform-like services (eg the comments section on a news publisher's websites or a real estate listings website like realestate.com.au). It would be highly undesirable for these organisations to be required to comply with two separate takedown systems: Australia's safe harbour system and the ACMA platform code.

**The new mandatory system has the potential to bind a large number of services**

While the ACCC review is targeted at major international UGC platforms like Facebook and YouTube, the proposed mandatory nature of the code has the potential to impose obligations under threat of financial penalty on a large number of websites and services that are not contemplated in the ACCC's draft report.

Thousands of services operating in Australia host third party content, from Wikimedia to discussion boards, WordPress to comments pages on news services. Will these organisations also be captured by the mandatory code? If they are, will they be required to meet the same standards as dedicated platforms and giant multinationals? If they are internationally based, will they be required to comply with both the Australian system and the international system?

In the end, simply shutting down the ability of users to post content is likely to be the most viable option for many sites. Yet the diversity of voices available through these services is one of the principal benefits provided by the internet. If newspapers and popular blogs shut down their comments sections because they cannot afford a filter system, free speech will be damaged, and society will be the poorer for it.

**There is room for improvement within the system**

The ADA supports progressing industry discussions on a number of the "issues of concern" identified by the ACCC,[70] and would be happy to participate in endeavours intended to address them within the context of an extended safe harbour system.

In particular there would be benefits for all parties gained from:

- improving ease of communication between rights holders and digital platforms;
- mechanisms to address particularly time-sensitive content; and
- measures to deal with repeat infringements.

However, this should happen within the established system, rather than creating a whole new system to deal with the same problem.

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[70] Australian Competition and Consumer Commission, *Digital Platform Inquiry - Preliminary Report* (December 2018) p.163

**Uploaders need protection too**

However, the ADA notes that mechanisms to challenge and appeal takedown are not included in the list of "issues of concern" that the ACCC identifies. It is essential that any administrative mechanism which seeks to deal with takedown also includes clear mechanisms for efficiently challenging takedowns, due to the errors and outright abuse of takedown services already discussed. This is important to provide natural justice, protect free speech and meet the reasonable expectations of individual Australians that they will be able to upload legitimate non-infringing materials to platforms like YouTube.

Such appeal mechanisms are even more important because takedown disputes are rarely "creator v consumer", as they are sometimes depicted – it is creators working and earning an income on these platforms who face the greatest risk from badly designed takedown regimes, and who therefore need quick and effective means to challenge them without the need to bring legal action. Australia has many well established creators working primarily or exclusively through platforms – such as The Juice Media,[71] Ozzie Man Reviews,[72] and SketchShe[73] on YouTube, or the 70,000 Australian designers currently distributing material through Redbubble. It is essential that the rights and incomes of these creators are protected alongside those of the large rights holders who make the most use of copyright takedown systems.

## H. Other Copyright Matters

**We support the decision not to recommend further changes to website blocking laws**

We support the ACCC's decision not to recommend any changes to the laws relating to website blocking. We note that Australia already has extremely broad website blocking laws which were again broadened in the last year to cover search engines and make it easier to block proxy sites.[74] We believe these recent amendments should be sufficient to address the concerns raised by rights holders on these matters in their submissions.[75]

**Caching and indexing should not be treated as copyright infringement**

We note that the ACCC lists caching and indexing as examples of potentially infringing activity that has been characterised as harmful by rights holders.[76] We strongly disagree with this characterisation. Although we agree that both caching and indexing may currently be illegal

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[71] https://www.youtube.com/channel/UCKRw8GAAtm27q4R3Q0kst_g.
[72] https://www.youtube.com/user/ozzymanreviews.
[73] https://www.youtube.com/channel/UC4FVKG3QEgghwbnPDtfC1-Q .
[74] You can see our comments on these amendments in our submission to the *Senate Environment and Communications Committee Inquiry into the Copyright Amendment (Online Infringement) Bill 2018* (November 2018) http://digital.org.au/our-work/submission/senate-environment-and-communications-committee-inquiry-copyright-amendment
[75] See, for example, FreeTV, *Submission by Free TV Australia Digital Platforms Inquiry Australian Competition & Consumer Commission* (April 2018), pp.41-43
[76] Australian Competition and Consumer Commission, *Digital Platform Inquiry - Preliminary Report* (December 2018) p.158

under Australian copyright law, due to a lack of appropriate exceptions, we believe this constitutes a major flaw in Australia's current regulation, and not a harmful activity that needs addressing. Without caching and indexing, the entire process for finding and communicating material via the internet is undermined. Arguing that platforms should be regulated to prevent, or pay for, caching or indexing is equivalent to arguing that telephone companies should be prevented from operating switches. It would be extremely damaging to the ability of the internet to function, undermining or removing the benefits it provides for creators as well as the general public.[77]

Such uses in the U.S. are considered a fair use.[78] The Chair of the ACCC, Rod Sims, has himself strongly supported the adoption of fair use in Australia in keeping with the recommendation of the Productivity Commission.[79]

[77] In 2011 Deloitte Economics estimated the annual value to the Australian economy that accrues to households from accessing the internet was $53 billion (Deloitte Access Economics, *The Connected Continent* (2011) available at http://www.deloitte.com/au/connectedcontinent). In 2012 Lateral Economics estimated the value of intermediaries to Australian home internet users at $12.6 billion a year for search engines, and $13.2 billion a year for social media platforms (Lateral Economics, *Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012) 3.1) https://lateraleconomics.com.au/wp-content/uploads/2014/01/Excepting-the-Future-Report-to-ADA-Sept-20122.pdf

[78] *Perfect 10 v Amazon*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v Arriba Soft* 336 F.3d 811 (9th Cir 2003); *Field v Google* 412 F. Supp 2d 1106 (D. Nev 2006)

[79] Rodd Sims, 'Fair use copyright reforms essential in a world of technological change', *Sydney Morning Herald*, 29 May 2017 available at https://www.smh.com.au/opinion/fair-use-copyright-reforms-essential-in-a-world-of-technological-change-20170529-gwfb0i.html

## Attachment A

# How the copyright safe harbours work

The below is adapted from *Australia's Online Service Provider Safe Harbours - A Guide for Libraries and Archives* by the Australian Libraries Copyright Committee. The full guide is at http://libcopyright.org.au/sites/libcopyright.org.au/files/documents/Safe%20Harbour%20Guide%20for%20Libraries%20and%20Archives_0.pdf

**Why have a safe harbour scheme?**

The copyright safe harbour scheme is set out in ss116AA-116AJ of the *Copyright Act 1968*. It is intended to encourage rights holders and online service providers to work together when dealing with copyright infringement. It:

- gives rights holders an efficient, non-litigious way to seek removal of infringing content;
- limits the liability of online service providers for infringements undertaken by their clients, as long as they collaborate with rights holders; and
- ensures consumers have clear rights to challenge incorrect claims of copyright infringement.

**How the scheme works**

The safe harbour scheme grants online service providers protection when their facilities are used to infringe copyright. Under the provisions, service providers do not have to pay financial damages for infringements undertaken by others on their systems as long as they take certain steps designed to limit the impact on copyright owners. The safe harbours prescribe these steps, with different steps applying to different activities (eg providing internet access, caching, hosting material). They include actions like having a clear contact for claims of copyright infringement, having a policy for dealing with repeat infringers, and complying with industry codes.

The most important part of the scheme is the notice and takedown system, the process of which is prescribed by Part 6 of the *Copyright Regulations 2017*. If a copyright owner believes that they have discovered an infringing copy of their content online, they fill in a prescribed form and send it to the service provider hosting the material. The service provider must then expeditiously remove public access to the material, and notify the client who uploaded it of its removal. If the client believes the removal is in error, they can send a counterclaim to the service provider to seek to have their material restored.

**Service providers eligible for the safe harbours**

The Australian safe harbours have traditionally only applied to carriage service providers as defined by the *Telecommunications Act 1997* ie commercial ISPs. However, the *Copyright Amendment (Service Providers) Act 2018* extended the safe harbours to cultural, educational and disability groups where they provide online services to the public.

**Services covered by the safe harbours**

The services to which the safe harbours apply are divided into the following categories:

A. Providing facilities to access the internet (s116AC);
B. Automatic caching (s116AD);
C. Storing or hosting materials for clients s116(AE); and
D. Linking to third party materials (s116AF).

**Requirements of services**

In addition to being within the above categories, the services themselves also need to meet certain requirements to fall within the safe harbours. These requirements vary depending on the service:

- For internet access and caching services - the service provider must not substantially modify the material being transmitted or cached
- For hosting and linking services - the service provider must not receive a financial benefit that is directly attributable to infringing activities
- For hosting services - the material must be hosted at the direction of a user (ie the service provide must not choose the material being hosted)
- For caching services - the service provider must respect technical restrictions

**Compliance steps for all service providers**

These steps must be completed by all service providers that wish to access the safe harbours:

1. Provide the title of and contact details for a designated person to receive copyright notices on their website.
2. Have a policy for termination, in appropriate circumstances, of the accounts of repeat infringers.
3. Remove material from their cache if it has been removed from the original site for being infringing – as soon as practicable after receiving a takedown notice from the copyright owner/licensee.
4. Remove any links from their system that point to infringing material – as soon as practicable after receiving a takedown notice from the copyright owner/licensee.
5. Comply with any relevant industry codes.

**Notice and takedown system for hosting services**

In addition to the above, those providing hosting services must follow the below notice and takedown procedure for any allegedly infringing material uploaded by others to their system:

6. Remove material uploaded by third parties to their system as soon as practicable after they:
    a. receive a takedown notice from the copyright owner/licensee alleging that it is infringing; or
    b. otherwise become aware that it is infringing.
7. Once the material is removed, they must notify the user who uploaded the material that it has been taken down, and the user has 3 months to issue a counter-notice if they wish to challenge the claim of infringement.
8. If they receive a counter-notice, they must send it to the copyright owner/licensee, informing them they have 10 working days to commence legal action.
9. If the copyright owner/licensee does not notify the service provider within 10 working days that they have commenced legal action, or if the action is unsuccessful, the service provider must restore the material.