AUSTRALIAN
DIGITAL ALLIANCE

submission to the

Senate Standing Committee on Environment and Communications Legislation

Inquiry into the Copyright Amendment (Service Providers) Bill 2017

January 2018

A. Executive Summary

The Australian Digital Alliance (ADA) welcomes the proposed amendments in the Copyright Amendment (Service Providers) Bill as an initial step towards reform of Australia's copyright safe harbours.

The amendments proposed by the Bill will ensure that Australia's libraries, archives, schools, universities and disability groups:

- have the same legal protections as commercial ISPs when providing the same services;
- have greater legal certainty and lower risk with engaging with and providing new technologies and innovative services; and
- can continue to provide innovation hubs, incubators, digital learning programs, repositories and open collection programs.

However, we strongly believe that the Bill should be amended to incorporate all service providers, including online platforms and marketplaces. This is essential to ensure that Australia has a "complete" safe harbour scheme, that works effectively and provides benefits for all our creators and innovators, as well as protections for Australian internet users.

Further extending the definition of "service provider" in Australia's safe harbour system to include technology companies would have the following benefits:

- it would align our law with international norms, and ensure Australian creators, consumers and service providers do not operate at a disadvantage to their international peers;
- it would provide Australian creators and consumers with a simple, low cost and effective method of dealing with illegal content, no matter where it is hosted; and
- it would allow Australian platforms that host user generated content to operate onshore, rather than encouraging them to base their businesses in countries that provide more legal certainty, like the US, Canada, Singapore, and South Korea.

Recommendations

The ADA submits that the Committee:

1. support the extension of the copyright safe harbour to Australia's libraries, archives, schools, universities and disability groups, as proposed by the Bill; but also
2. recommend - consistent with the recommendations of multiple previous inquiries (see below) - that the safe harbour scheme be further extended to all online service providers, including technology companies, in line with international norms and our obligations under the Australia-United States Free Trade Agreement.

B. About the Australian Digital Alliance

The ADA is a non-profit coalition of public and private sector interests formed to provide an effective voice for a public interest perspective in copyright policy. It was founded by former Chief Justice of the High Court of Australia, Sir Anthony Mason in February 1999, to unite 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. ADA members include universities, schools, disability groups, libraries, archives, galleries, museums, technology companies and individuals.

Our primary contact with regards to this submission is our Executive Officer, Jessica Coates, who can be reached at jessica@digital.org.au.

C. The copyright safe harbours and how they work

The copyright safe harbour scheme is a simple system that 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 who wish to challenge incorrect claims of copyright infringement have clear rights to do so.

The safe harbours operate by prescribing a number of steps that service providers can voluntarily take to manage copyright infringement on their services. Different steps apply to the different activities covered by the safe harbour scheme (eg providing internet access, caching, hosting material) and include actions like having a clear contact for claims of copyright infringement, having a policy for dealing with repeat infringers, and compliance with industry codes.

The most important part of the scheme is the notice and takedown system, the process of which is prescribed by law.[1] 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. The service provider informs the copyright owner of the counter-notice, who then has 10

[1] Copyright Act 1968 (Cth) ss116AA-116AJ and Copyright Regulations 2017

working days to commence legal action in relation to the material. If they do not commence legal action in this time, the service provider restores the material.

A service provider will not be held liable for damages for the related copyright infringement if:

1. they have taken all the steps required by the safe harbour, including the expeditious takedown of any infringing material; and
2. they did not obtain a direct financial benefit from the infringement.

The problem

In Australia, the safe harbour system currently only applies to carriage service providers ie commercial ISPs like Telstra or Optus. However, many other entities also provide the services the fall within the safe harbour scheme, including schools, universities, libraries, archives, disability groups and local technology companies.

As these other service providers do not qualify for the safe harbours, they are at potential risk of being held liable for copyright infringements undertaken by their clients every time they provide these services, even if they take steps to remove infringing content from their services. Furthermore, creators whose material is being hosted on these services do not have a clear mechanism for having it removed without resorting to costly legal action. And those internet users making use of the services (for example someone who accesses the internet in a public library, a school or university student, or a user of an online marketplace or website) have fewer legal rights to respond to copyright claims or protect their fair dealing rights than people who buy their internet access via an ISP.

Safe harbour schemes are designed to encourage cooperation between rights holders and service providers to reduce copyright infringement in the online environment. They provide substantial benefits for these groups and the economy as a whole by:

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

A safe harbour system which does not include all service providers fails in all three of these goals.

D. Benefits of the proposed amendments

The ADA supports the amendments proposed by the current Bill as an important first step in reforming Australia's safe harbour system they will provide tangible benefits for Australia's schools, universities, libraries, archives and disability groups.

These organisations play a important role as online service providers for the Australian community. Schools, TAFEs and universities provide transmission services and caching facilities to millions of students, teachers and academics; libraries and archives provide them for the general public; and disability groups provide them for their members. They all host content on local networks and operate intranets and learning management systems as part of their daily activities. Increasingly, consistent with community and government expectations, they also employ the latest technologies to engage more widely with their communities and partner with local and international businesses in digital literacy programs, digital hubs, incubators to name just a few.

By their very nature, the technologies employed in these activities involve making copies and communications, and are being utilised by individuals over whom the organisations have little or no control. As a result, these organisations are exposed to a risk of copyright infringement that did not exist in a pre-digital era - one that comes with potentially high costs in the form of damages and legal fees. The risk is real - in 2003 music companies commenced proceedings against universities alleging that their IT systems had been used to infringe copyright.[2] Since this incident, universities have had to incur significant costs annually managing this risk, costs that out far outweigh any corresponding benefits.

The changes proposed by this Bill mean that these organisations will finally have the same legal certainty and protection as commercial ISPs when they provide the same services. They will be on equal footing with their international counterparts in countries that provide broader safe harbour coverage, and they will be able to take advantage of the latest technologies and techniques with confidence. In short, the Bill enables them to continue to provide Australian students, teachers and the general public with the tools they need to fully participate in the digital age.

For example, as a result of these changes:

- Public libraries will be able to expand their digital activities, providing internet access and digital literacy programs with greater confidence;
- Schools and TAFEs will be able to take full advantage of new technologies without fear that it will expose them to litigation and potential damages;

[2] See discussed at http://www.theguardian.com/business/2003/mar/28/students.highereducation; http://www.smh.com.au/articles/2003/08/29/1062050658496.html

- Universities running online repositories will have a clear, legally supported process to deal with accidental infringements by academics, students and partners materials, lowering their legal risk;
- Disability groups will have the same protection when they provide online services for their client as commercial ISPs; and
- Those who access online services through these groups will have more rights and tools to defend their free speech.

E. Australia needs a complete safe harbour solution

However, despite the advantages of the proposed amendments, they only go **part** of the way to fixing the problems with Australia's copyright safe harbour. Australia will not have a truly effective safe harbour system until we extend the scheme to include all groups providing the services it purports to cover, including start ups and technology platforms.

The partial amendments proposed in the Bill fail to provide Australia with a modern safe harbour scheme which grants appropriate protection for creators, consumers and online innovators in the digital environment. Our system for removal of infringing content will remain unnecessarily complex and costly, and our technology companies will still be working at a disadvantage to their international peers.

The ADA submits that expanding the safe harbours to all online service providers would create a universally applicable, localised Australian anti-piracy system that benefits Australian creators, internet users and local technology companies and startups. This is mandated by Australia's international obligations, and should be introduced as a priority.

Consecutive government reports have recommended the extension of Australia's ISP safe harbour scheme to cover **all groups** providing the same online services. Most recently these include:

- the Productivity Commission's 2016 Report into Australia's intellectual property arrangements;[3] and
- the Joint Standing Committee on the Trans Pacific Partnership.[4]

These reports, coupled with the government's ongoing Digital Economy Strategy review, provide a unique opportunity to address this long-term issue. While Australia's laws remain out of line with the rest of the world the problem will still need fixing.

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[3] See http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf Chapter 19

[4] See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TransPacificPartnership/Report_165/section?id=committees%2freportjnt%2f024012%2f24258

Efficient takedown mechanism

The Australian system both in its current form and with the proposed extensions will not provide a simple, uniform, affordable and non-litigious system for having infringing material online removed.

In an era in which content can be created and disseminated by almost anyone almost instantly, the appearance of some infringing material online is inevitable, both through willful infringement and as a result of ignorance or lack of understanding of the law. While some of this material will appear on websites hosted by Australian ISPs and on services provided by the education, cultural and disability sectors, a high percentage will always appear on popular online platforms that provide free hosting services, such as user generated content sites and online marketplaces. Unless these services are covered by the scheme, it will always have a "gap", failing to provide a universal solution for the efficient removal of infringing material and leaving Australian creators whose materials appear on them without their permission with no clear options except to hire a lawyer.

What is easier for a local content creator: sending a prescribed form via an email or online form to a service provider, or commencing costly legal proceedings? Expanding the safe harbours would allow all local creators to use the simple mechanism already working effectively for ISPs with the widest possible range of online service providers.

By applying different legal settings for groups providing the same services, this partial solution creates an unnecessarily complex system for takedown of infringing material in Australia. The law will require individual creators to understand the technical and legal difference when their material is hosted on a ISP or a platform, and to know which legal processes apply in each case. Consumers who have made use of free online platforms only to see their materials removed due to accusations of copyright infringement will also miss out on the legal "right of reply" guaranteed them under the scheme, meaning that material taken down incorrectly will often remain down, regardless of objections by the poster.

The principal opponents to the extension of the safe harbours to technology companies are large commercial entities who would prefer to rely on direct licences for management of their material when it appears on the large platforms. As APRA/AMCOS states in its Productivity Commission submission, their primary objection is that extending the scheme to online platforms "will reduce the incentives for such entities to enter into commercial agreements with copyright owners."[5]

However, the existence of a safe harbour system does not prevent the large players from entering into direct licensing agreements. For example, in the US where safe harbours do apply to online platforms, Youtube and Facebook have both entered into commercial

[5] sub. DR404, p 14

licensing arrangements with representatives of rightsholders that function alongside the safe harbour system.

Furthermore, this argument very clearly leaves out individual creators, who do not have the option to enter into individual licences with platforms, and small startups, with whom the large commercial players have no interest in dealing. They will still be required to take expensive and time-consuming legal action to deal with infringing material online. See, for example, the testimony of graphic designer Steve Dance on the Expand Safe Harbours website.[6] An expanded safe harbour scheme will provide additional protection for these vulnerable groups while still allowing direct licensing by larger players.

It is vital that Australia have a working safe harbour system, not one that picks and chooses which internet users, creators and service providers will be given protection and certainty. Without it, our system will continue to disadvantage the local creators and startups that are so important to our innovation agenda.

Encouraging technological innovation

The proposed amendments will improve to some degree how the Australian system meets this objective, by reducing the risk for our educators, disability groups and cultural institutions when they engage with new technologies and services in their important role in the innovation ecosystem.

However, these groups represent only part of the innovation ecosystem. As the latest *Crossroad 2017* report from StartupAus details, Australian technology companies are a one of the most rapidly growing sectors of our economy, with venture capital investment almost doubling from $568 in 2015-2016 to $1billion in 2016-2017.[7] Furthermore, for each new technology based job, five additional jobs are created in other sectors.[8]

Enabling innovation in our technology sector is therefore extremely important, and a working safe harbour system is part of this. Without it, Australia remains a high-risk environment for hosting content, putting Australian startups at a competitive disadvantage to their international peers, who have lower risk and greater legal clarity. Our goal should be to give Australian startups a world leading regulatory environment, in a manner that will enable them to thrive locally while still continuing to protect Australian creators and internet users.

[6] http://expandsafeharbours.today/

[7] Crossroads (2017) StartupAus, p.6

[8] Crossroads (2017) StartupAus, p.18

The importance of safe harbour regimes to enabling innovation is well recognised internationally.[9] The legal certainty provided by safe harbours are particularly important for startups and can directly impact on local investment. In fact, a 2011 survey of venture capital investors found that 81% said they would be more likely to invest in a digital content platform under a weak economy with safe harbor rules than in a strong economy that lacked limitations on intermediary liability.[10] The flow on effect of this to the broader economy is clear, with a recent US economic study estimating that weakening the US safe harbours would eliminate over 425,000 jobs and decrease the US gross domestic product would decrease by $44 billion annually.[11] The same study concluded that:

> the effects of the greater certainty [provided by the US safe harbour], among other reasons, contributed to the business success of U.S.-based Internet intermediaries... [As a result] In 2014, the United States accounted for 13 of the 21 largest Internet companies in the world and if China is excluded, 13 of the largest 16. According to a study measuring the U.S. Internet, the sector accounted for 6 percent of GDP in 2014. It has also grown rapidly relative to other industries; its GDP share grew by over 88 percent between 2007 and 2012. It is also a sector where employment has grown rapidly, by almost 16 percent yearly between 2007 and 2012. Importantly, it is a sector with higher wages than the U.S. average, those employed in it earned almost 30 percent more on average in 2012. Thus, U.S. Internet safe harbors function as an important catalyst to the U.S. economy.[12]

It is for this reason that consecutive independent reviews have recommended that the Australian government extend our safe harbours to all service providers, not just those operating in non-profit sectors. The Productivity Commission was particularly vocal on this matter, finding that extending the coverage of Australia's safe harbour regime to all service providers would "improve the system's adaptability as new services are developed…[and] is an important balance to the expanded protections for rights holders Australia has accepted as part of its international agreements."[13]

We also note that there are strong questions about the practicality of attempting to differentiate between the activities of those now proposed to receive safe harbour protection - schools, universities, libraries, archives and disability groups - and other online

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[9] See, for example David Kravets "10 years later, misunderstood DMCA is the law the saved the web" (Wired, October 2008) https://www.wired.com/2008/10/ten-years-later/

[10] Matthew Le Merle et. al., The Impact of U.S. Internet Copyright Regulations on Early Stage Investment, A Quantitative Study (2011) Booz&Co.

[11] https://internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf p.2

[12] https://internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf p.5

[13] Productivity Commission, Intellectual Property Arrangements (2016) http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf at p.567

service providers. With the encouragement of the government, these sectors all engage in joint projects with commercial entities, and projects with potential commercial output eg incubators and innovation hubs that may spawn start ups. It is unclear whether such joint projects will receive protection under the fractured safe harbour system proposed by the Bill.

Global level playing field

A full copyright safe harbour is very much the global norm, and is a requirement of most modern bi- and multi-lateral treaties. It is therefore those companies who have chosen to make Australia their home who are penalised by the decision not to include all service providers in our system.

A forthcoming report by Professor Kimberlee Weatherall on *Internet Intermediaries and Copyright* clearly demonstrates how isolated Australia is internationally.[14] The 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 remains an outsider globally by imposing a high risk of liability for copyright infringements undertaken by clients on its online service providers. All comparable countries provide at least some protection against legal liability for those providing common online services, regardless of who the service provider is. The draft table below (**Table 1**) provides a traffic light assessment of all 10 markets. The full updated version report will be provided to the Committee shortly.

This universally broad application flows directly from the policy history and justification for the safe harbour schemes. The concept was first introduced by the US as part of its 1998 Digital Millennium Copyright Act to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age".[15] In line with this goal, the US uses deliberately broad and flexible language to define service providers to whom the safe harbour applies, designed to adapt with technological and industry changes and ensure that anyone providing online services for others may take advantage of it - be they ISPs, libraries, schools, universities or online platforms.

[14] Kimberlee Weatherall, *Internet Intermediaries and Copyright* (forthcoming 2018). A related 2011 report which provides a similar assessment can be found at http://digital.org.au/our-work/publication/internet-intermediaries-and-copyright-australian-agenda-reform

[15] S. Rep. No.105-190, at 1-2 (1998).

Table 1: How risky is internet intermediary business?[16]

Country	Providing internet access (IAP)	System level/proxy caching	Hosting (Cloud Computing)	Hosting a user-generated site	Running a search engine or similar
Australia: other online service provider	Green	Red	Red	Red	Red
Australia: carriage service provider	Green	Green	Green	Green	Green
United States	Green	Green	Green	Green	Green
Canada	Green	Green	Green	Green	Green
Singapore	Green	Green	Green	Green	Green
South Korea	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
Japan	Green	Green	Red	Red	Green
Israel	Green	Green	Orange	Orange	Orange

[16] Please note that this is a draft version of this table, which is yet to be updated for the latest international developments. Please access the final report at http://digital.org.au/publications for the final version.

This same broad language has been adopted by equivalent nations internationally as it is necessary to ensure the proper working of the scheme. No other country that has introduced copyright safe harbours limits them to commercial ISPs as Australia does - Canada, Singapore and South Korea (to name a few) all have functional safe harbour systems, and all apply them to all online service providers. This puts paid to any argument that the scheme was never intended to apply to online platforms and marketplaces.

Indeed, the catalysing document for Australia to introduce its own safe harbour laws - the Australia-United State Free Trade Agreement - provides a similarly broad definition of service provider:

> For the purposes of the function referred to in clause (i)(A), service provider means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing, and for the purposes of the functions referred to in clause (i)(B) through (D), service provider means a provider or operator of facilities for online services or network access.

It clearly envisages that the scheme will encompass all service providers, with no reference to discriminating due to their commerciality or otherwise. It is for this reason that the ADA has long argued that Australia is in breach of its obligations under the AUSFTA due to its restriction of its safe harbours to carriage service providers. This argument is supported by leading academics Professors Jane Ginsburg and Sam Rickertson, who have noted that the scheme is not only narrower that its DMCA counterpart, it is also "narrower that the obligations in the AUSFTA."[17]

The risks are real

While Australia's safe harbour laws remain incomplete, Australian technology companies will continue to face increased legal risk and associated costs. The reality of this risk is clearly demonstrated by two legal cases brought against Australian online marketplace Redbubble.[18]

The first of these cases, based around content featuring Pokemon characters that was made available on the Redbubble marketplace, concluded in late 2017 with the court finding that

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[17] 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).

[18] *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 available at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541 ;*Hells Angels Motorcycle Corporation (Australia) Pty Ltd ACN 123 059 745 v Redbubble Pty Ltd ACN* 119 200 592 & Anor (Federal Court Proceedings No QUD902/2015) summarised at http://www.tglaw.com.au/ip-blog/2015/10/14/highway-to-hell-hells-angels-bikies-sue-redbubble-for-ip-infringement/

Redbubble was legally liable, both directly and as an authorising agent, for infringing material that had been uploaded by its users.

This case makes clear that in the absence of safe harbour protection Australian technology companies and service providers will be held liable for infringements undertaken by users. This counters arguments frequently put forward by opponents of safe harbour extension that Australia's authorisation laws do not adequately apply to service providers.

Furthermore, Redbubble was found liable despite the fact that the court agreed that it "took conscious, considered and reasonable steps, both proactively and responsively, to prevent infringements and to prevent the continuation of infringements".[19] The reasonableness or otherwise of the steps Redbubble took was a major point of contention between the parties in the case. This demonstrates that both creators and companies would benefit from clarification of what steps to prevent infringement are "reasonable" under Australian law - clarification that would be provided under a safe harbour system.

The final outcome of this case was in one sense a vindication for Redbubble, as the court awarded only nominal damages of $1 due to lack of evidence of damage and declined to to award any injunctions or special damages because of Redbubble's good practice. However, significant time and expense was incurred achieving this outcome. The government should therefore see the extension of the safe harbour scheme to all online service providers as an opportunity not only to reduce risk and cost for important segments of Australian industry, but also to clarify the legal rights and responsibilities for all actors in the space, including creators, consumers and platforms.

F. Conclusion

The Australian Digital Alliance (ADA) supports the proposed amendments in the Copyright Amendment (Service Providers) Bill, as providing real benefits to Australia, its educators, its non-profits and its citizens.

However, it submits that further amendments are needed to ensure Australia receives all the benefits of a fully functional safe harbour system. Unless safe harbours apply to all service providers, including technology companies and start ups, Australia's safe harbour system will remain piecemeal, unnecessarily complex, inequitable for creators and consumers, and will place our local innovators at a disadvantage to their international peers.

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