



Safe Harbours and the future of the Australian Technology Industry

Response by:
OneGov

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1. Overview

The future of Australian innovation depends on modern, fair and globally competitive copyright laws that reflect the digital age.

Part of this innovation is the provision of safe harbours, which provides legal protection for internet service providers in exchange for them helping copyright owners enforce their rights online.

The Australian Government has recently considered amending the safe harbour provisions in the Copyright Act so that they apply to schools, universities, libraries, cultural institutions and technology platforms. Many organisations from across a diverse range of sectors across Australia have called for this important and long-awaited reform.

The Australian Government is commended for understanding this digital ecosystem and limiting safe harbours to passive service providers that do not control the creative content on their services such as universities and schools.

However, the Australian Government has not taken into account the needs of the Australian digital industry in extending safe harbour laws in the Copyright Act to all of internet services including schools, universities, libraries, cultural institutions and technology platforms.

In light of the recent anniversary of the National Innovation and Science Agenda, we call on the Australian government to support this reform because we're serious about growing Australian innovation together.

Safe harbours are necessary for the benefit of the Australian economy particularly for start-ups, creators, education and other service providers. Without safe harbours, there is less legal certainty for businesses, less choice for consumers and places Australia at a major disadvantage globally.

OneGov calls on the Australian Government to support the legislative amendment to the Copyright Act that extends the safe harbour scheme to all online service providers.

“OneGov joins the call with Australian industry, schools, universities, libraries, peak bodies and start-ups to take a strong stance on extending safe harbours to local technology companies so they can remain globally competitive.”

2. Safe Harbours and the Future of Australia

2.1 The purpose of safe harbours

Australia's copyright laws contain a simple process for dealing with online copyright infringement. This process is commonly referred to as "safe harbours" because it provides legal protection for internet service providers in exchange for them helping copyright owners enforce their rights online.

The system works by:

- Allowing copyright owners to send takedown notices, asking for infringing copies of their content online to be removed;
- Incentivising innocent service providers to take quick and effective action to remove any infringing content from their networks or services in exchange for limiting their liability for any infringements by their users;
- Protecting consumers by giving them the right to challenge a takedown notice (for example, to claim the content is their own, or that they have a legitimate right to use the content) by sending a counter notice.

2.2 Why safe harbours matter

2.2.1 Safe harbours create more jobs

Without safe harbours, hosts may be liable for much of the copyright infringing content that their users upload or share. It is often prohibitively expensive and time-consuming to pre-screen all content before it is uploaded. It is for this reason that many large social media platforms do not base their operations in Australia.

Importantly, large businesses including YouTube, Facebook and Reddit employ over 90,000 people directly and experience high growth. If Australia does not offer safe harbours, then businesses will send their operations overseas, resulting in many missed job opportunities and tax revenue for the Government.

2.2.2 Safe harbours provide better legal protections for consumers

It is unfair that people who use internet services provided by public libraries, schools and universities receive fewer legal protections than the customers of commercial Internet Service Providers (ISPs) or people overseas.

Consumers also stand to lose if providers of internet services, who do not have adequate legal protections, decide it is too risky to continue providing these services – particularly when it is often the most disadvantaged Australians who, for example, need to use the internet services provided by public libraries.

Safe harbours would provide legal protections for digital platforms hosting copyright infringing content if they remove it quickly after being notified.

This protection is currently only available for internet service providers and the current bill proposes extending it slightly to include educational institutions and a select few non-for-profits.

2.2.3 Safe harbours makes Australia globally competitive

Limiting safe harbours only serves to discourage Australian start-ups from the chance to experiment in a reduced-risk environment without a tangible trade-off to Australian content creators.

Extending safe harbours put local businesses on an even playing field with key competitors, builds home grown talent and ensure tax is kept in Australia, not overseas.

These changes are needed to bring Australia into line with many of our major trading partners, including the US, UK, Singapore, South Korea and Japan. Currently online service providers in these countries, enjoy a competitive advantage over their Australian peers even when they are delivering services to Australians.

If Australian businesses do not receive equal treatment with respect to safe harbours, then many will look to re-locate their business offshore where better treatment is afforded to businesses.

The benefits of reforming the safe harbours is particularly important for Australian start-ups. Given, our copyright laws are so out of step with our major trading partners who have appropriate safe harbours, there is greater incentive to innovate overseas where start-ups have proper protections. This also puts Australian start-ups at a disadvantage to overseas businesses.

2.2.4 Safe harbours limit piracy

Piracy is a huge issue for content creators, understandably. It reduces income and potentially makes the profession unviable, especially for independent creators. This in turn may reduce the overall creative content available.

Piracy needs to be addressed holistically ensuring legal content is affordable or at least comparable, timely and accessible. Consumer trends are changing and old business models such as exclusive agreements where consumers have to wait longer and pay more for content are simply no longer viable.

Extending safe harbours helps to limit piracy by providing a clear framework to take down pirated content in a fast, easy and affordable way. This in turn makes it harder to access illegal content. Safe harbour is a sensible solution that allows content creators and policy makers time to develop strategies against piracy that tackle the issue holistically.

Importantly limiting access to safe harbour does not provide additional protections for Australian content creators. This is because safe harbour is already available for platform providers that host the majority of Australian content, such as Facebook, Google, Youtube, and Amazon through overseas safe harbour schemes. As a consequence, Australian content by and large is already subject to safe harbour regimes. Limiting safe harbour in Australia then, only serves to inhibit innovation without providing tangible benefits to content creators.

Put another way, policy decisions are made on trade-offs. Are the economic impacts of limiting platform innovation outweighed by the economic impacts on content creators? The fact is, the economic impact on Australian content creators through safe harbour can't be reduced by limiting safe harbour in Australia because most Australian content is hosted on platforms that already operate within other international safe harbour regimes.

3. State of Play

3.1 The problem with the existing laws

Due to a drafting error in Australia's copyright laws, the safe harbours provisions only apply to commercial Internet Service Providers (ISPs) such as Telstra, iiNet and Optus and not to all providers of internet services including schools, universities, libraries, cultural institutions and technology platforms. The system is inequitable and creates major disparities across industries.

As a result of this drafting error, internet services provided by public libraries, schools or universities (such as Redbubble and 99 Designs) have a greater risk of being sued for any copyright infringements by people using their services.

Moreover, Australians who access the internet using these types of internet services do not have the same legal rights to challenge takedown notices as the customers of commercial ISPs, or of people who use those services in other countries.

Australian Copyright owners do not have a simple process in Australia to get infringing copies of their content removed from online unlike other countries around the world.

The current laws make Australia out of step with international best practice in Europe, the UK, the US, South Korea and Singapore. In an increasingly competitive world, this makes no sense for Australia.

Successive government reviews since 2005 have identified the need for this reform. The Australian Government expressly agreed with the need to fix the scheme in its 2014 Online Copyright Infringement Discussion Paper.

If you run an online platform, safe harbour would have given you legal protections for hosting copyright infringing content if you remove it quickly after being notified. This is a very disappointing outcome for Australia.

3.2 What amending the laws means

The proposed amendment would simply replace the term "carriage service provider" with the term "service provider" to legally protect all service providers, not just commercial ISPs. There will be no risk to the income of Australian copyright owners, including authors, publishers, artists, musicians and photographers. There will also be greater incentives for all internet service providers and copyright owners to work together to fight piracy locally in Australia.

There are differing views that amending the Copyright Act will hurt Australian creators.

Despite this, the Australian businesses are strong supporters of copyright and the right of Australian creators to be fairly rewarded for the use of their works.

3.3 What is at risk if the laws do not change?

3.3.1 Heightened legal risk and globally uncompetitive

Providers that are excluded from the safe harbour scheme as mentioned, face heightened legal risk and consequently carry higher compliance costs. This is a real concern – for example, in 2003 music companies commenced proceedings against Australian universities alleging that their IT systems had been used to infringe copyright. This heightened risk is also a serious impediment to service innovation, putting Australian start-ups at a competitive disadvantage and providing another reason for them to move offshore.

3.3.2 Higher costs of addressing copyright infringement

Given that the existing current safe harbour scheme is restrictive and cumbersome for creators, of content, Australian creators are in many cases burdened with much slower and often prohibitively expensive processes, involving the Federal Court, to achieve the removal of infringing material.

If safe harbours are not extended to all internet service providers, then Australian tech start-ups for example are discouraged from the chance to experiment in a reduced-risk environment.

Moreover, excluding platforms from safe harbours doesn't make much difference to larger businesses tech companies such as YouTube and Facebook, since they already operate within the United States safe harbours. However, it does affect start-ups and other businesses. It is not just the US with broader copyright safe harbours than Australia - jurisdictions around the world extend safe harbours to internet intermediaries beyond ISPs.

For example, the European Union provides that member states must ensure that any hosting provider will not be liable for unlawful content posted by users, provided it acts quickly to remove the content upon notice. Australian consumers using free online services to host their content have no local legal protections against wrongful takedown claims, while companies using commercial ISPs do.

3.4 What is the benefit in amending the laws?

The proposal is a straightforward legislative amendment and is long overdue. The legislative correction will have a number of tangible benefits, including:

- Australian technology start-ups will have one less reason to move offshore;
- Consumers will have local legal protection from wrongful take-down requests;
- Australian online platforms that host user generated content can operate onshore, rather than basing their operations in safe harbour countries like the US, Singapore, South Korea and Japan;
- Australia will finally achieve real compliance with our obligations under the Australian-US Free Trade Agreement (AUSFTA), which requires all service providers to have access to the safe harbour scheme
- universities running online repositories have a process to deal with accidental infringements (e.g. for uncleared quotes or where rights have been transferred to publishers) by academics uploading materials, avoiding excessive legal risk;
- Libraries can make user-uploaded collection additions available online to the public;
- Legislative amendment will create an environment that fosters Australian innovation;
- These changes will bring Australia into line with many of our major trading partners, including the US, UK, Singapore, South Korea and Japan. This will give local start-ups a fair go against the competition;
- Safe harbour creates more jobs: Google, Facebook, YouTube, Snapchat, Reddit and Pinterest employ over 90,000 people directly but these platforms don't base their operations in Australia because of our outdated copyright laws;
- Importantly safe harbour helps prevent piracy and protects content creators by providing a clear framework to take down pirate content in a fast, easy and affordable way. This in turn makes it harder to access illegal content which is good for content creators;
- Lastly, as the Australian Information Industry Association points out, the economic impact on Australian content creators cannot be reduced by limiting safe harbour in Australia because most Australian content is hosted on platforms that already operate within other safe harbour regimes. Limiting safe harbour only serves to discourage innovation without a corresponding benefit to content creators.
- Safe harbours are good for creators, offering a simple and efficient system for removing infringing content online.

4. OneGov Recommendations

Replace 'carriage' with 'online' to the existing legislation to extend safe harbours.

Replacing 'carriage' with 'online' in the relevant sections of the Copyright Act will extend the safe harbour scheme to all 'online service providers'.

This solution was proposed in the December 2015 exposure draft of the Copyright Amendment (Disability Access and Other Measures) Bill and is recommended by the Productivity Commission in their recent Report into Australia's Intellectual Property arrangements (recommendation 19.1).