



Senate Standing Committee on Environment and Communications Legislation -

Inquiry into the Copyright Amendment (Service Providers) Bill 2017

Submission by Redbubble Limited

30 January 2018

A. Executive Summary

Redbubble submits that the copyright safe harbour protection should be extended beyond the education and not for profit sectors to commercial online service providers, for the following reasons:

1. Safe harbours recognise the realities for Australian platforms that host user generated content and provide a fair and effective process for managing infringement on user generated content platforms;
 2. Safe harbour protection is critical for the fostering of innovation in the Australian technology sector and promoting Australia's international competitiveness;
 3. A safe harbour would promote collaboration between all parties (content owners, artists and platforms) in the fight against infringement; and
 4. The limited safe harbour extension in the Bill applying only to the education sector and NFP sector will be impracticable to administer.
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B. Introduction

About Redbubble

Redbubble is an Australian founded and headquartered online marketplace for independent artists. The Redbubble marketplace facilitates those artists' display of their artworks and designs to users of the Redbubble website. Those users are then able to purchase artwork and designs from the independent artists on one or more of 68 physical products (apparel, stickers, wall art, device cases and more) with the artwork printed on demand by a network of independent third party fulfillers.



Redbubble listed on the ASX in May 2016. Redbubble's business is truly global, with a large office based in San Francisco and third office in Berlin. Over 90% of Redbubble's revenues are from customers outside Australia.

The Redbubble website attracts over 20 million visitors per month. There are currently over 10 million artworks and designs displayed on the website from over 600,000 artists. Artists have earned over \$100 million from the site, with over 10% of this going to Australian artists. The income that artists are earning on the Redbubble platform is growing at around 50% per year. The contribution that Redbubble is making to both the global and Australian artists community is greater than any other single Australian organisation, including the Australia Council.

Redbubble's Melbourne head office is where its technology staff are located employing Australian residents in the high paying technology jobs of the future and making a significant contribution to the Australian digital economy.

Redbubble is a leader in online marketplace start ups in Victoria that together are delivering a \$1.6 billion boost to the state economy (referred to by EY's January 2018 report in collaboration with LaunchVic "A Review of Melbourne's Digital Marketplaces"). In addition to providing a \$1.6 billion boost to the economy, online marketplace start ups currently employ 13,000 people and create 80,000 jobs across Victoria. The report further highlights that the e start up sector in Victoria is growing at 11 per cent per annum, which is far above the Victoria's current industry growth rate of three per cent.

C. **Submissions:**

1. ***Safe harbours recognise the realities for Australian platforms that host user-generated content and provide a fair and effective process for managing infringement on user-generated content platforms (for all parties)***

Redbubble (like many modern day innovative technology companies) depends on user generated content (**UGC**) for the operation of its platform. In Redbubble's case the UGC is the artwork and designs uploaded by users. Redbubble operates content takedown and repeat infringer removal policies in accordance with the prescribed elements of the US safe harbour protection (under the Digital Millennium Copyright Act (**DMCA**)). If Redbubble receives a notice from a copyright owner, given in good faith, alleging that content on the Redbubble website is infringing and identifying the content sufficiently, then Redbubble removes the content



expeditiously. For users found to be 'repeat infringers', Redbubble will disable or terminate their accounts.

As well as the DMCA being the regulatory framework that applies in Redbubble's biggest market, Redbubble considers the notice and takedown requirements of the DMCA framework to be the most appropriate process for balancing the interests of intellectual property content owners, artists and modern internet platforms hosting UGC. Until a platform for user generated content is provided with notice from a copyright holder claiming that content is infringing, it simply cannot know if that work may infringe another's rights.

Redbubble's users upload thousands of images daily to the website from all over the world. The determination of whether content is infringing can often very grey. For example:

- The uploaded work may be legitimate fair dealing with the original work e.g. parody or satire and the boundaries of fair dealing are often difficult to delineate;
- Whilst one person may be familiar with certain referential images that reflect television show characters or brands they are aware of, another may not recognize these brands on first pass.
- Some users may actually own licenses to the content they are posting and be able to do so legally, even if it is referential to pop culture; and
- Some content owners actually want their fans to upload their content because it keeps older brands alive, so they will often instruct Redbubble to maintain images on the website even though that they may believe the images infringe their rights.

The DMCA brings order to this chaos and allows the content owners to dictate how their rights are enforced, while allowing marketplaces like Redbubble and content owners a clear avenue by which to engage and a clear process to operate within. The DMCA framework then requires the marketplaces to act appropriately once the content owners' desires and communicated to the marketplace. If the marketplace does not remove allegedly infringing content expeditiously following notice, then marketplace is not conferred with the protection of the safe harbour. The DMCA therefore focuses the inquiry on whether the marketplace is properly working with content owners in fighting infringement.

Extension of the safe harbour scheme to all online service providers further provides an opportunity to clarify the legal rights and responsibilities for all actors in the space, including platforms, content owners and artists. It would provide all parties with a simple, low cost and effective method of resolving disputes non litigiously and dealing with infringing content.



In addition, the safe harbour system provides protections for artists whose materials have been taken down due to accusations of copyright infringement, ensuring they have a legal “right of reply” (aka ‘counter notice process’). Under this process, artists can have their material restored if they believe it to be non infringing. An incomplete safe harbour system can therefore mean that material taken down incorrectly will often remain down, despite objections by the artist.

In Redbubble’s experience, the DMCA framework provides an extremely efficient process for removal of problematic content from the website and fosters collaborative relationships with content owners. Redbubble is therefore disappointed that this framework has not yet become part of Australian law, putting Redbubble at a disadvantage to its offshore competitors (further explained in section 2 that follows).

2. ***Safe harbour protection is critical for innovation in the Australian technology sector and promoting international competitiveness***

The Internet depends on user generated content. The biggest and most successful modern technology companies are platforms for user generated content, including Facebook, Instagram, Reddit, Snapchat, YouTube. Search engines such as Google depend on the indexing of third party content to provide their service. Those companies could not have thrived to the extent they have, without the protection from copyright infringement provided by the US DMCA safe harbor framework.

Extension of safe harbour protection to commercial online service providers is vital for the innovation agenda in Australia. High Growth Start ups have been the primary drivers of all new job creation in Australia. This growth has been dominated by a few “Gazelles” (of which Redbubble is one, but including Aconex, Wisetech, Atlassian, Envato, 99 Designs and more recently Canva). Without safe harbour protection this growth is at risk and with it, the future of the Australian economy.



Conclusions — High growth firms

High growth firms account for the majority of growth in the economy

High sales growth firms were on average around **30 per cent** of all firms in Australia.

Gazelles make a significant contribution to the economy

The aggregate contribution of start-up firms varies, but is always disproportionate to their total share

Over the period examined, high sales growth firms accounted for:

- 66 per cent of net employment growth,
- 67 per cent of net sales growth,
- 84 per cent of net export growth,
- 70 per cent of economic growth.

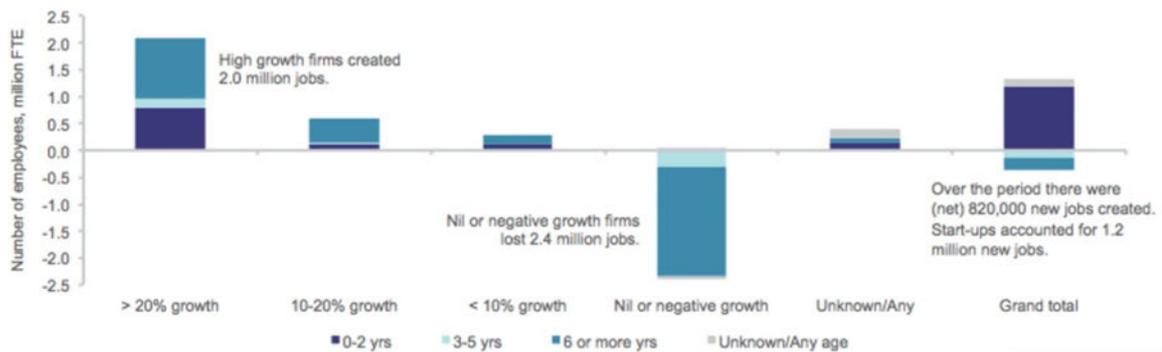
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Net employment growth driven by start-ups

High growth firms accounted for 66 per cent of net positive employment growth

Figure 1.1: The net contribution of firms to employment growth, by firm age and average annualised growth class, 2004–05 to 2010–11



Notes: Averages incorporate all industry classes except SICSA2 firms. Average annualised growth rates are calculated on a total sales basis over a rolling three year period.
Source: ABS (2016) Expanded Analytical Business Longitudinal Database

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Enabling innovation in our technology sector is therefore extremely important, and a working safe harbour system is a critical part of this.

Safe harbour protection is provided to commercial online service providers in countries where the technology sectors are thriving, including US, Canada, Israel, Singapore, and South Korea.



This makes Australia a relatively higher risk environment for hosting content compared to these international peers, putting Australian start ups at a competitive disadvantage and encouraging start ups to base their businesses in countries that provide more legal certainty.

By being out of step with its international peers, Australia cannot give rise to future innovations or create employment in this area. It would ensure that Australia never creates a company of the likes of Facebook or YouTube.

3. A safe harbour for all online service providers would encourage further cooperation in dealing with online infringement

Safe harbours encourage content owners and technology companies to work together to address copyright infringement. Because Redbubble promotes the integrity of content on its marketplace and promotes an online community built on respect and recognition of artists, Redbubble has leveraged and built upon the US safe harbour framework to build collaborative relationships with content owners in the management of content on the website – and, where appropriate, has entered into proactive policing arrangements to remove problematic content. In addition Redbubble provides detailed information to users in relation to intellectual property rights so they avoid infringing the rights of others.

4. The limited safe harbour extension for the education/NFP sector creates an impractical distinction

We anticipate issues of practicality in the distinction now drawn between the education/NFP entities proposed to receive safe harbour protection and commercial online service providers. There are countless examples of the educational/NFP sectors engaging with commercial entities on projects with potential commercial output. It remains uncertain whether such projects would receive safe harbour protection under the current proposals. An example of this is Redbubble's recent successful collaboration with the State Library of Victoria, under which Redbubble's artist community were called upon to create designs inspired by classic works from the Library's collections.

We further anticipate that the distinction will create a complex and confusing system for takedown of infringing material in Australia. Rights holders will need to understand the distinction between educational/NFP sector platforms and other platforms and make difficult judgments as to whether the safe harbour process would be applied from one platform to the next.



We note that the complexities that are created by the distinction between commercial and other online service providers have been one factor in consecutive government reports that have recommended the extension of Australia's safe harbour scheme to cover all groups providing the same online services, including the 2014 ALRC Digital Economy Inquiry and the Productivity Commission's 2016 Report.

D. Conclusion

For over 15 years, successive industry, legal and Parliamentary reports have recommended a comprehensive safe harbour regime. The proposed legislation does not provide this and continues to leave Australia out of step with the rest of the OECD. This places Australian companies at an unsupportable disadvantage versus their peers. In a global world, Australia depends far more on such companies than they do on Australia.

The legal risks arising from successive governments failing to extend safe harbour protection to commercial online service providers are real and felt directly by Redbubble. The Federal Court recently handed down its judgment in proceedings brought by the Pokémon Company International against Redbubble, with the Judge making findings of copyright infringement against Redbubble, but awarding only nominal damages of \$1. The Judge declined to award Pokémon any injunctions or additional damages under section 115(4), noting that Redbubble "had in place processes to prevent and mitigate breaches which were reasonable and defensible" and citing Redbubble's "conscious, considered and reasonable steps, both proactively and responsively, to prevent infringements and to prevent the continuation of infringements". The Judge found that "the evidence for Redbubble was that of seeking to comply with its obligations under law and it has amended its program so that there was no evidence before the Court of a threat of further infringement". However, despite Redbubble's practices, under the current safe harbour provisions it does not have the benefit of a statutory limitation on the remedies which are available against it.

It is in no one's interest for proceedings to be brought against good actors in the intellectual property space such as Redbubble. A proper safe harbour for commercial online service providers would go some way to deterring such litigation in the future and to ensuring that no monetary relief could be awarded against such entities who take appropriate steps to deal with infringing content on their platforms.