



ARTS LAW CENTRE OF AUSTRALIA

*Submission to the Environment and
Communications Legislation Committee's
Inquiry into the Copyright Amendment
(Service Providers) Bill 2017*

January 2018

ABOUT THE ARTS LAW CENTRE

The Arts Law Centre of Australia (**Arts Law**) welcomes the opportunity to provide comment on the Copyright Amendment (Service Providers) Bill currently being considered by the Senate's Environment and Communications Legislation Committee.

Arts Law is Australia's only community legal centre for the arts sector. Our area of expertise is the provision of legal advice regarding intellectual property (**IP**) matters affecting artists and arts organisations. Arts Law provides business advice, professional development resources, education and advocates on law and policy reform for the benefit of the creative sector.

Artists in the Black (**AITB**) is a specialist program at Arts Law and facilitates legal advice and information about legal issues for Aboriginal and Torres Strait Islander artists and communities. We also advocate on issues relating to cultural appropriation. Our experience is that Indigenous Cultural Intellectual Property (**ICIP**) does not have adequate protection under copyright law and that Indigenous artists are in a sadly unique and vulnerable position in relation to enforcing IP rights in their works which are often of significant cultural and community value.

Arts Law is a non-profit organisation which derives no direct financial benefit from the trade in the works and IP rights of the artists we advise. This positions us to provide independent comment, though clearly with artists' interests foremost in our reasoning.

COPYRIGHT AMENDMENT (SERVICE PROVIDERS) BILL 2017

Arts Law has reviewed the Bill and makes the following comment:

Background to Safe Harbour Scheme

The Safe Harbour scheme implemented into Australian law in 2004 formed part of the requirements of Australia's Free Trade Agreement with the United States. The scheme is designed to provide incentives for service providers to inhibit infringements of copyright from occurring on their networks. Where rights owners identify infringing material hosted on carriage service providers' (**CSPs**) sites to which they assert ownership, they are able to send notice of the infringement to the relevant CSP with an obligation on the CSP to remove the offending content.

Proposed extension of safe harbour scheme to limited group of entities

The Bill proposes to extend the shelter provided under the Australian safe harbour scheme to educational institutions, libraries, archives, key cultural institutions and organisations assisting the print disabled in Australia, categorising these organisations as 'Service Providers'.

Arts Law welcomes the limitation of the extension of the scheme to these organisations. We are particularly reassured that it is not proposed to extend the safe harbour scheme to online service providers such as content aggregators and social media sites that operate on commercial bases, and that make wide use of copyright material of third parties.

Enabling efficient and affordable redress for online copyright infringement

We welcome the expansion of this scheme insofar as it enables creators to take action against online infringement in a cost-effective and efficient manner, where court based alternatives represent both practical and economic barriers to creators exercising and enforcing their copyright rights.

Potential for unintended consequences

We are however concerned that proper analysis of any unintended consequences of these amendments with a potential negative impact on creators is undertaken. We remain committed to ensuring that amendments do not hamper the legitimate economic interests of creators, and especially that they do not interfere with the operation of the well-established statutory licences in the education and government sectors in Australia, along with other licensing activity. The statutory licences are elements of the Australian copyright framework that distinguish it from the US and that provide efficient and equitable access to copyright content in these sectors, balancing the rights of creators and other copyright owners with the need of users of content to access copyright content.

As referred to earlier, Arts Law runs AITB, a dedicated program for Indigenous artists and communities. From our operation of this program we are aware of the unique and often vulnerable position of Indigenous artists in relation to the protection of their IP rights. We therefore urge government to analyse in particular any negative impact the expansion of the safe harbour scheme might have on Indigenous artists and their art works. These works are culturally significant, sometimes sacred and the IP rights in these works are often the most valuable economic property an artist will own – and any income derived from the use of these works often supports a number of family and community members.

Information programs about new safe harbour schemes for Indigenous artists

We hope government will consider programs to ensure that information and awareness of the proposed expansion of operation of the safe harbour scheme is provided to Indigenous artists and communities across Australia, an area with specific requirements and challenges. We would happily discuss with government measures for the effective dissemination of this information.

Information programs for Service Providers about the safe harbour scheme

The expansion of the safe harbour scheme to new classes of entities should be supported by an information campaign among the relevant representatives of these entities to ensure they understand the scope of the scheme and the requirements in relation to copyright notices, and the operation of notice and take down procedures. Education for these entities will assist in compliance with the obligations for service providers contained in the legislation.

Onus on Service Providers to monitor and take-down infringing content

As submitted previously by Arts Law in relation to the safe harbour scheme, we are concerned at the burden placed on rights holders to monitor and issue take down notices relating to the reposting of infringing content once a take down notice has been issued. Often URLs proliferate after this action, and Arts Law is concerned that resource-poor artists should not have to bear the solo burden of tracking this activity when service providers are better placed to monitor such repeat infringement activity. We therefore urge Government to consider mechanisms to better balance this burden with a positive requirement on the service providers which will enjoy being able to shelter under the safe harbour scheme to use their network infrastructure to minimise the reposting of infringing content.

Possible need for a register of Service Providers relying on the safe harbour scheme with contact details

With the proposed expansion of the safe harbour scheme to provide shelter to many more entities, Arts Law considers it may be appropriate to introduce a register of service providers that includes

information for creators to obtain contact details for a responsible person for an entity wishing to rely on the safe harbour provisions. A quick scan of the websites run by entities that would be covered by the scheme displays a lack of consistency in terms of copyright provisions and contact details, with some sites providing less than obvious navigation to such pages. A register would make it easier for creators and rights owners to rely on the notice and take down provisions of the safe harbour scheme. We note the US has established such a register in addition to the requirement of entities that rely on the safe harbour scheme to publish such contact details on their websites: <https://www.copyright.gov/dmca-directory/>.

CONCLUSION

Arts Law would be pleased to provide further information or be involved in future consultation regarding the proposed amendments in the Bill, and especially in relation to any information campaign to raise awareness of the operation of the safe harbour scheme, especially to Indigenous artists and communities.

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