

# Australian Greens' dissenting report

## Summary

1.1 The Australian Greens welcome the incremental progress that this bill makes in bringing Australian copyright laws up to date and in line with other countries.

1.2 We do not support the piecemeal manner in which the Government are addressing the long overdue updating of Australian copyright laws.

1.3 We do not support the limited definition of 'service providers' used in this bill, which excludes Australian tech companies and online content providers, stifling innovation and the ability of Australian tech companies to compete internationally.

1.4 We do not believe that this bill achieves the necessary balance between the rights and protections of content providers and content creators.

1.5 We do not believe that this bill will be effective in achieving the policy objectives, due to the lack of protection provided for third-party organisations carrying out activities on behalf of service providers.

## Relevant Background

1.6 In 2013, Senator Scott Ludlam introduced the Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013, which included four reforms to copyright law that would:

- Remove digital locks or technical protection measures that lock-up content and restrict visually impaired people from utilising audio editions of e-books or converting a text book into braille.
- Create a 'safe harbour' to prevent Australian universities, schools, cultural institutions, content service providers and internet service providers from being sued for what others may do with material to which those organisations have allowed access.
- Remove geocodes that enforce different prices and conditions of use of content by Australian consumers, thus removing a barrier to Australians purchasing legitimate content from overseas.
- Introduce a 'fair use' exception in the Copyright Act to support digital innovation and promote access to collections in Australian cultural institutions. The fair use provisions would allow the 'fair use' of copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research without that use being an infringement of copyright.

1.7 In 2017, the Copyright Amendment (Disability Access and Other Measures) Bill 2017 was passed, which included the disability access archiving measures proposed in 2013 by Senator Ludlam.

1.8 Some of the key issues still outstanding under Australia's outdated copyright laws include:

- Operating a search engine in Australia risks infringing copyright.
- Australian schools are spending millions of dollars to use content that is freely available online, such as free tourism maps or fact sheets for treating head lice.
- It is illegal to remove digital locks from a legally purchased e-book in order to read it on a different device or back it up.
- Music can be copied from a CD to a tablet but not a purchased DVD.
- Playing an online video in a presentation to a group is illegal.
- Comedians can use material in parody or satire but artists can't use the same material for art.

1.9 In December 2016, the Productivity Commission reported on Australia's Intellectual Property Arrangements and recommended that 'Australian Government should expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services'.

### **Extending Safe Harbours**

1.10 Currently Australian universities, libraries, schools, digital innovators, cultural institutions, and tech companies provide internet services without the benefit of the same safe harbour as their equivalents overseas. A Safe Harbour would allow content providers to make information and culture available online and will be protected by common activities—transmitting data, caching, hosting and referring users to an online location—where service providers do not control, initiate, or direct the users' online activities are currently not covered by the scheme.

1.11 The Bill defines 'Service Provider' to be a carriage service provider; an organisation assisting persons with a disability; or a body administering a library, archives, cultural institution or educational institution. This extension of the Safe Harbour protection is supported by the majority of the submissions to the inquiry on the legalisation. However, these protections are not extended to digital innovators or tech companies.

1.12 Many of the submissions cited the need to also include internet and content service providers in the Safe Harbour exception and to further review Australia's copyright laws. The submissions in support of this expansion of Safe Harbours came from digital innovators, tech companies, Government bodies, libraries, and independent advocates.

1.13 National and State Libraries Australia<sup>1</sup> stated that 'extending safe harbours to commercial service providers would assist libraries to clarify potential liability and reduce risk associated with projects and initiatives undertaken in partnership with commercial entities.'

1.14 National Archives of Australia<sup>2</sup> 'supports further extension of the safe harbour protection to all online service providers, including commercial platforms. We engage and participate with commercial players, such as the Google Cultural Institute, to deliver innovative digital activities. Affording them the same protections will help to address the problems of online infringement.'

1.15 SBS<sup>3</sup> states that 'SBS supports the Bill, which proposes to expand the existing safe harbour regime to a limited range of other service providers, including SBS. However, we note that it is only one small piece in the puzzle of copyright law reform, and that there is much still to be done before Australia has a flexible future-proof copyright legal regime.'

1.16 The Law Council of Australia<sup>4</sup> notes 'that extension of the safe harbours, to all service providers, has been proposed in a number of reviews now, including most recently in the Final Report of the Australian Productivity Commission's Inquiry into Intellectual Property Arrangements (Recommendation 19.1).'

1.17 Optus urges government to extend safe harbour to online platforms and states that extending safe harbour is critical to Australia's digital future for the following reasons:

- 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

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1 National and State Libraries Australia, *Submission 6*, p. 2.

2 National Archives of Australia, *Submission 14*, p. 1.

3 SBS, *Submission 20*, p. 1.

4 Law Council of Australia, *Submission 35*, p. 1.

regimes. Limiting safe harbour only serves to discourage innovation without a corresponding benefit to content creators.<sup>5</sup>

1.18 Redbubble states the following reasons for the need to extend the safe harbour protection to commercial online service providers:

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.<sup>6</sup>

1.19 Google<sup>7</sup> notes that 'the Draft Bill's narrow safe harbour scheme places Australian-based startups and online service providers—including individual bloggers, websites, small startups, video-hosting services, enterprise cloud companies, auction sites, online marketplaces, hosting providers for real-estate listings, photo hosting services, search engines, review sites, and online platforms—in a disadvantaged position compared with global startups in countries that have strong safe harbour frameworks, such as the United States, Canada, United Kingdom, Singapore, South Korea, Japan, and other EU countries.'

1.20 Digital Rights Watch notes that extending the safe harbour to all service providers benefits all parties for the following reasons:

- It increase certainty and reduces legal risk for emerging Australian content hosts and tech startups, decreasing the risk of flight to more hospitable jurisdictions (like the United States).
- It provides a clear procedure for copyright owners to request content to be removed from the internet, particularly benefiting small Australian copyright businesses.
- It provides due process safeguards for the legitimate interests of ordinary Australian users and digital media entrepreneurs who have been either inadvertently or maliciously subject to spurious takedown requests.

Without a safe harbour regime, service providers are left to their discretion to make judgments about whether content should be removed or not. This is

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5 Optus, *Submission 13*, p. 1.

6 Redbubble, *Submission 18*, p. 1.

7 Google, *Submission 24*, p. 2.

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a system with little transparency and almost no due process protections. A legal, regulated system is a much better option to protect the rights of publishers and authors online.<sup>8</sup>

1.21 Re:Create notes the importance of safe harbours for creative democratisation:

Separating out safe harbors and having them apply to only certain not-for-profits and educational-focused institutions fails to recognize the important role that commercial platforms play in enabling the massive creative democratization provided by the internet. Instead, Australia should provide safe harbors to all. Tens of millions of people are now creating and sharing things globally on a host of different commercial platforms. Some are making money, others are not. But they now have outlets for the creative ideas that simply would not exist without safe harbors for commercial platforms.<sup>9</sup>

1.22 The Computer & Communications Industry Association states that the proposed legislation 'will significantly disadvantage Internet services who seek to operate in the Australian market and will impede creativity and innovation online.' They also note that:

...the bill pointedly leaves out commercial service providers including online platforms. This exclusion overlooks the fact that many of the non-profit and educational institutions that would be nominally protected by the revised safe harbour in fact rely heavily on the private sector and contract for digital services from commercial providers to meet the needs of their constituencies. To extend protection to these institutions while withholding it from the service providers who in fact serve as the intermediaries renders the proposed exception largely meaningless. Moreover, the failure to include online services such as search engines and commercial content distribution services will also harm digital services in Australia and the opportunity for growth of the domestic startup economy. A comprehensive safe harbour, on the other hand, would place Australian innovators on equal footing as competitors in other Pacific countries that have a more robust framework for online services including South Korea and Singapore.<sup>10</sup>

Rightsholders have argued that expansion of these safe harbours would lead to mass piracy. This argument fails to recognize the record of success of both online innovators and content creators in markets with robust safe harbours. Reports show that the U.S. safe harbour framework—which is available to all online service providers—has enabled the production of music, movies, books, and video games which are exported all over the world. This is why many companies, artists, designers, and consumers have

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8 Digital Rights Watch, *Submission 26*, p. 1.

9 Re:Create, *Submission 29*, p. 2.

10 Computer & Communications Industry Association, *Submission 30*, p. 2.

urged Australia to meet its commitments regarding safe harbour protections.<sup>11</sup>

1.23 The Australian Information Industry Association<sup>12</sup> 'urges government to extend the safe harbour provisions to online platforms', noting that extending the safe harbour 'creates more jobs and protects content creators from piracy' and 'puts local businesses on an even playing field with key competitors, builds home grown talent and keeps them here (paying taxes)'.

1.24 The Australian Digital Alliance<sup>13</sup> 'strongly believe that the Bill should be amended to incorporate all service providers, including online platforms and marketplaces.' They state that:

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.<sup>14</sup>

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.<sup>15</sup>

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11 Computer & Communications Industry Association, *Submission 30*, p. 3.

12 Australian Information Industry Association, *Submission 31*, pp. 1–2.

13 Australian Digital Alliance, *Submission 34*, p. 2.

14 Australian Digital Alliance, *Submission 34*, p. 2.

15 Australian Digital Alliance, *Submission 34*, p. 3.

1.25 The Digital Industry Group Incorporated<sup>16</sup> states that they are 'disappointed the Government has specifically excluded the Australian tech industry from the proposed safe harbour scheme' and that:

Expanding safe harbours to all online service providers is important as it would not only encourage greater innovative activity by Australian businesses, but place them on a level playing field with overseas competitors. In particular, it would reduce Australia's high-risk legal environment for hosting content as compared with overseas counterparts such as the US, the EU, Canada, Singapore, Korea and New Zealand, that already have safe harbour schemes.

If the government moves ahead with a safe harbour scheme that excludes domestic online service providers, Australian startups and service providers will be in a significantly disadvantaged and high-risk position operating without the basic legal safe harbour protections that global startups in all the regions above rely on to ensure certainty about their collaborative work with rightsholders to remove allegedly infringing third-party content.<sup>17</sup>

Expanding safe harbours to all online service providers would also benefit rights holders by creating a simple and consistent system that provides them with an efficient way to seek the removal of infringing content online without going to court, and incentivise service providers to collaborate by granting them certain legal protections.<sup>18</sup>

1.26 99Designs states that:

At the moment we don't have a clear legal framework to deal with any infringing content that a user may upload to our platform. This created legal risk for our business that puts us at a big disadvantage to our competitors overseas. To compete in the global marketplace, and continue to employ Australians in Australia, we need the protection provided by the safe harbour scheme, which startups based in United States, the EU, UK, Canada, Japan, Korea, and Singapore have relied on (in some cases, for decades), to ensure that we do not face unnecessary legal risk and uncertainty in Australia. Furthermore, no country in the world has split the scope of its safe harbors to apply to the non-profit sector but carve out, and exclude, its domestic technology industry and homegrown entrepreneurs. The safe harbors would also ensure we have a clear and globally legally recognised process for assisting copyright owners to address any copyright concerns that may be present on our service.<sup>19</sup>

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16 Digital Industry Group Incorporated, *Submission 38*, p. 2.

17 Digital Industry Group Incorporated, *Submission 38*, p. 2.

18 Digital Industry Group Incorporated, *Submission 38*, p. 3.

19 99Designs, *Submission 39*, pp. 1–2.

## AUSFTA Obligations

1.27 Many of the submissions noted that the proposed safe harbour scheme fails to comply with the Australia-United States Free Trade Agreement (AUSFTA) obligations to provide liability limitations for service providers for copyright infringement.

1.28 The Law Council of Australia state that:

...art 17.11.29 of Australia's Free Trade Agreement with the United States obliges Australia to provide 'limitations in its law regarding the scope of remedies available against service providers for copyright infringements that they do not control, initiate, or direct, and that take place through systems or networks controlled or operated by them or on their behalf'. Australia's copyright law remains inconsistent with this obligation, and out of step with legislation in comparable jurisdictions which provide general safe harbours, including the US, Europe, Canada, and Singapore (among others).<sup>20</sup>

1.29 Digital Rights Watch point out that:

Australia adopted the safe harbour regime as part of the Australia–US Free Trade Agreement (AUSFTA). When legislation enacting the terms of AUSFTA was introduced, however, it contained a drafting error that limited its application only to 'Carriage Service Providers' (telecommunications providers and ISPs) but not to those entities who really need it—content hosts.<sup>21</sup>

1.30 Digital Industry Group Incorporated states that:

Expanding the safe harbour scheme to all service providers is required under Australia's international obligations, in particular under the Australia-US Free Trade Agreement (AUSFTA), which requires parties to introduce limitations on the liability of providers of Internet services for copyright infringement. Full expansion of the scheme will ensure Australia is no longer in breach of its legal obligations under the AUSFTA, a breach which has been publicly confirmed by international copyright experts Professors Jane Ginsburg and Sam Ricketson. The Joint Standing Committee on Treaties (JSCOT) also recently recommended "the Australian Government progress the safe harbours amendments in the proposed Copyright Amendment (Disability and Other Access Measures) Bill".

1.31 Google also notes that:

...the proposed safe harbour scheme fails to comply with the Australia-United States Free Trade Agreement's (AUSFTA's) obligation to provide liability limitations for service providers for copyright infringement. By including domestic Australian-based "carriage" broadband service

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20 Law Council of Australia, *Submission 35*, pp. 1–2.

21 Digital Rights Watch, *Submission 26*, p. 2.

providers but excluding online service providers in the U.S. and elsewhere from the scope of the safe harbour protection, the proposal further exposes Australia to concerns that the regime creates a trade barrier to Australia's digital content market and fails to comply with Article 17.11.29 of AUSFTA.<sup>22</sup>

As a consequence of Australia's more limited safe harbour scheme, Australia is currently out of step with many of its major trading partners, including the U.S., Canada, the EU, the UK, Japan, Singapore, and South Korea. International copyright experts, Professors Jane Ginsburg and Sam Ricketson, have also expressed the view that Australia's safe harbour framework is not only narrower than its U.S. counterpart, but also "narrower than the obligations contained in the AUSFTA."

There is longstanding international legal consensus that the carriage service provider-only limitation leaves Australia's safe harbour scheme out of compliance with the requirements of AUSFTA. Similarly, in 2014, a group of leading Australian law professors wrote that extending safe harbours to allservice providers "will finally bring Australian law into compliance with its obligations under art. 17.11.29 of AUSFTA."<sup>23</sup>

### Third Party Providers

1.32 Several submissions also expressed concerns that the defined service providers in the proposed legislation would, in effect, not be protected due to a lack of protection for providers carrying out activities on behalf of service providers.

1.33 Universities Australia stated that:

In the digital age, many universities rely on third party, cloud-based providers to carry out some or all of the activities that fall within the scope of the safe harbours. Universities Australia is concerned that the current drafting could potentially be construed as limiting the protection of the safe harbours to activities that are carried out "by" a university itself, which could potentially leave universities outside the scope of the safe harbours in the event that the relevant activities were carried out by a third-party provider "on behalf of" the university.

...We respectfully urge the Committee to recommend the inclusion of a provision that makes it abundantly clear that the safe harbour extends to activities that are carried by a third-party provider "on behalf" of an entity that is a "service provider" under the Bill.<sup>24</sup>

1.34 The Law Council of Australia also noted that:

Many educational institutions, libraries, archives and organisations that assist people with disabilities work with technology providers—Australian

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22 Google, *Submission 24*, p. 2.

23 Google, *Submission 24*, pp. 7–8.

24 Universities Australia, *Submission 7*, p. 2.

and overseas—lack in house capacity to build online platforms themselves, or can more efficiently and effectively innovate in collaboration with external experts and service providers. Universities, for example, are working with cloud providers to provide secure storage for research data that can be accessed by their researchers wherever they happen to be working. In this context, safe harbours that cover only the activities carried out by public sector institutions will not enable innovation, or enable them to enhance their online offerings in a professional, or efficient way. Hosting contracts with external providers are likely to place the risk of noncompliance with copyright on the public interest institution. This will leave the institution without the benefit of any safe harbour, and in no better position than prior to the enactment of this Bill. It also denies the opportunity for innovative companies to develop new technologies and services for use by schools, libraries or archives.

An alternative would be to include in the safe harbour activities done "by or on behalf of" the institutions intended to be covered by the safe harbour. Such drafting would allow public interest organisations to innovate entirely in-house, but also then use services and products developed in the private sector.<sup>25</sup>

1.35 The Digital Industry Group Incorporated also stated that:

...many of the nonprofit service providers to which safe harbours would apply under the proposed Bill rely on the very digital service platforms that are excluded from the Bill to serve their users and students; therefore excluding the tech industry from the scope of the safe harbours can have a negative effect on the public institutions that rely on leading commercial online services to fulfill their educational and cultural missions. For those service providers, the exception becomes somewhat ineffective as it also potentially limits their access to leading commercial online services.

## **Recommendation 1**

**1.36 The Australian Greens recommend implementing the definition of service providers as proposed in the Government's 2015 Exposure Draft of the Copyright Amendment (Disability Access and Other Measures) Bill 2016, which defined 'service provider' as 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.**

## **Recommendation 2**

**1.37 The Australian Greens recommend that the intent and language related to activities that are carried by a third-party provider 'on behalf' of an entity that is a 'service provider' be clarified in consultation with stakeholders.**

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25 Law Council of Australia, *Submission 35*, p. 3.

### **Recommendation 3**

**1.38 The Australian Greens recommend that the Government continues to review copyright legislation to introduce a Fair Use exception and to remove geocodes that enforce different prices and conditions of use of content by Australian consumers.**

**Senator Janet Rice  
Deputy Chair**

**Senator Jordon Steele-John  
Senator for Western Australia**

