

The Senate

Environment and Communications
Legislation Committee

Copyright Amendment (Service Providers)
Bill 2017

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Chapter 1

Introduction

1.1 On 7 December 2017, the Senate referred the Copyright Amendment (Service Providers) Bill 2017 (the bill) to the Environment and Communications Legislation Committee for inquiry and report by 19 March 2018.¹

Conduct of the inquiry

1.2 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant organisations and individuals inviting submissions. The date of receipt of submissions was 30 January 2018.

1.3 The committee received 38 submissions, which are listed at Appendix 1. The public submissions are available on the committee's website at www.aph.gov.au/senate/ec.

1.4 The committee held a public hearing in Melbourne on 6 March 2018. A list of witnesses who gave evidence at the public hearing is available at Appendix 2. The Hansard transcript may be accessed through the committee's website.

1.5 The committee thanks the individuals and organisations that contributed to the inquiry.

Scope and structure of the report

1.6 This report comprises two chapters. The remaining sections of this chapter discuss the purpose of the bill, the background to the bill and the Scrutiny of Bills Committee review of the bill. Chapter 2 outlines the principal issues raised in evidence and provides the committee's findings and recommendation.

Purpose of the bill

1.7 The bill seeks to extend the operation of the 'safe harbour scheme'² set out in Division 2AA of Part V of the *Copyright Act 1968* (the Copyright Act) to a broader range of 'service providers'. Proposed section 116ABA will extend the safe harbour scheme to include, in addition to a carriage service provider:

1 *Journals of the Senate* No. 79, 7 December 2017, pp. 2513–14.

2 The term 'safe harbour scheme' refers to a provision in a statute that allows for conduct that would otherwise incur a liability or penalty to be deemed, subject to prescribed conditions, not to violate the law. The 'safe harbour', subject to conditions, acts as a protection and therefore encourages conduct that promotes beneficial outcomes. See also, Australian Digital Alliance, *Submission 34*, pp. 3–4.

- educational institutions, through their administering bodies, including universities, schools, technical colleges, training bodies and pre-schools;
- libraries that either make their collection available to the public or are Parliamentary libraries, through their administering bodies;
- archives, through their administering bodies, including the National Archives of Australia and specified state archives, galleries and museums;
- key cultural institutions, through their administering bodies, including specific archives and libraries that are not open to the public; and
- organisations assisting persons with a disability.³

1.8 In the second reading speech on the bill, the minister stated:

Extension of the safe harbour scheme to service providers in these sectors will provide greater certainty to educational and cultural institutions and to those organisations assisting people with a disability about their responsibilities in engaging in the online space.⁴

1.9 The minister added that users of these institutions and organisations' services will also have additional protection under the safe harbour scheme. In addition, the minister stated that 'the Government has made the decision to make this incremental expansion of the safe harbour scheme, so that it can continue to consult on how best to reform the scheme to apply to other online service providers in the future'.⁵ The minister concluded:

The Government will continue to work with stakeholders to find a way to further extend the safe harbour scheme in a way that allows Australian businesses to harness the significant opportunities of the growing digital economy while ensuring respect for the creative efforts and economic rights of creators. The Government is confident that through this staged approach it can find a way to provide a practical and responsive safe harbour framework that operates effectively in the Australian environment.⁶

Background to the bill

1.10 Following Australia's entry into the Australia-United States Free Trade Agreement in 2005, a new regime for determining when carriage service providers (CSPs) might be liable for copyright infringements by users over the CSP's network or services was established. The scheme was based on the 'safe harbour' concept. The following overview of the scheme was provided by the minister in his second reading speech on this bill:

3 Explanatory Memorandum (EM), p. 6.

4 Second Reading Speech, *Senate Hansard*, 6 December 2017, p. 9904.

5 Second Reading Speech, *Senate Hansard*, 6 December 2017, p. 9905.

6 Second Reading Speech, *Senate Hansard*, 6 December 2017, p. 9906.

The scheme in the Australia-United States Free Trade Agreement was intended to provide an alternative to court proceedings for copyright owners where their infringing material is hosted, cached or linked to by a service provider or where a provider's network services are used to infringe copyright. It sets out conditions that a service provider must comply with, including in some situations, taking down infringing material or removing links to infringing material when they have been notified of a suspected infringement by a copyright owner. When the scheme was originally implemented in Australia, it was restricted only to carriage service providers—or providers of telecommunications services (such as Internet Service Providers) as they are more commonly known. This cautious approach was taken because the Internet was still in its infancy.⁷

1.11 The Copyright Act defines a 'carriage service provider' by reference to the *Telecommunications Act 1997*: a 'carriage service provider' is a person who uses a network unit to supply carriage services to the public. This includes telecommunications companies such as Telstra, Optus and TPG.⁸

1.12 The safe harbour scheme protections are confined to certain categories of activities that may be provided by a CSP:

- Category A – acting as a conduit for internet activities by providing facilities or services for transmitting, routing or providing connections for copyright material.⁹
- Category B – caching through an automatic process.¹⁰ Caching is defined as the reproduction of copyright material on a system or network controlled or operated by a CSP in response to an action by a user in order to facilitate efficient access to that material by that user or other users.¹¹
- Category C – storing copyright material on their systems or networks.¹²
- Category D – referring users to an online location (linking).¹³

1.13 To obtain the benefit of the safe harbour protections from liability, the CSP must comply with certain conditions in relation to each category of activity, which in some situations requires the taking down or removal of the copyright infringing material, or removing links to infringing material when the CSP has been notified of a

7 Second Reading Speech, *Senate Hansard*, 6 December 2017, p. 9904.

8 EM, p. 6.

9 *Copyright Act 1968*, s. 116AC.

10 *Copyright Act 1968*, s. 116AD.

11 *Copyright Act 1968*, s. 116AB.

12 *Copyright Act 1968*, s. 116AE.

13 *Copyright Act 1968*, s. 116AF.

suspected infringement by a copyright owner (generally referred to as 'notice to take down' procedures).¹⁴

1.14 Critically, a CSP is only entitled to the protection of the safe harbour scheme if it provides services to the public:

Entities providing services that fall within the four categories prescribed, cannot take advantage of the safe harbour scheme unless they provide network access 'to the public'. A range of organisations and businesses operate services to provide internet access to their clients, customers, students and other users, but not 'to the public'. These entities fall within the Category A activity, but they are excluded from the definition of [CSP].¹⁵

1.15 Music Rights Australia (MRA) commented that:

...safe harbours were not intended to shield ISPs from liability where they themselves engaged in distribution of copyright material or where they intervene or participate in the communication and making available copyright content. They were meant to ensure that innovation was not thwarted by the fear of copyright liability in certain cases where technologies or services were used by third parties.¹⁶

1.16 By contrast, the term 'service provider' in the United States safe harbour scheme is more broadly defined than the term understood in Australian law. In the United States:

...the courts have determined that, for the purposes of the US scheme, the term 'service provider' includes an internet service provider acting as a conduit for peer-to-peer file sharing programs, providers of the software and operators for instant messaging services, internet service providers that provide subscribers with news groups and online vendors. This extends the application of the scheme beyond entities responsible merely for providing the infrastructure for the internet.¹⁷

Scrutiny of Bills Committee

1.17 When examining a bill or draft bill, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills. The Scrutiny of Bills Committee assesses legislative proposals against a set of

14 *Copyright Act 1968*, s. 116AH.

15 Attorney General's Department, Consultation Paper, *Revising the Scope of the Copyright 'Safe Harbour Scheme'*, October 2011, p. 3.
<https://www.ag.gov.au/Consultations/Documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme.pdf>, (accessed 14 February 2018).

16 Music Rights Australia, *Submission 36*, Attachment 1, Exposure draft submission, p. 5.

17 Attorney General's Department, Consultation Paper, *Revising the Scope of the Copyright 'Safe Harbour Scheme'*, October 2011, p. 4 (citations omitted).

accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

1.18 The Scrutiny Committee examined the bill in its *Scrutiny Digest*, No. 1 of 2018, and made no comments on the bill.¹⁸

18 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 1 of 2018, 7 February 2018, p. 16.

Chapter 2

Key issues

2.1 This chapter examines the principal issues raised by stakeholders. The committee's overall conclusions on Copyright Amendment (Service Providers) Bill 2017 (the bill) are provided at the end of the chapter.

Stakeholder views on the limited extension of the safe harbour scheme

2.2 The principal issue raised in submissions is whether the protections of the safe harbour scheme should be extended beyond the definition of 'service provider' proposed by the bill to all online service providers. The following discussion provides an overview of the arguments provided by stakeholders.

Support for the limited extension as proposed in the bill

2.3 Many submitters representing the rights of copyright holders supported the proposed limited extension of the safe harbour scheme as envisaged by the bill. Music Rights Australia (MRA), for example, stated:

We are pleased to support the bill because the government has chosen to approach the amendments through the first-principle lens. They have created new, discrete classes of service providers which include those educational institutions I mentioned before and also cultural institutions and organisations which support people with disabilities. The music community supports this innovative and fit-for-purpose solution.¹

2.4 Submitters provided a range of reasons for this support. First, it was argued that the proposed amendments continue to reflect the original policy intent for the introduction of the safe harbour scheme, that is, 'to reserve eligibility for safe harbour protections to only those activities that are primarily passive, technical and automatic in nature'.² The Australian Copyright Council added:

It is very clear from the material surrounding the introduction of the safe harbour regime in the US and Australia that the principle behind the provisions is that passive carriers with no control over the material carried on the services should not be liable for copyright infringement, provided

1 Ms Vanessa Hutley, General Manager, Music Rights Australia, *Committee Hansard*, 6 March 2018, p. 16.

2 Australian Film & TV Bodies, *Submission 32*, p. 2. See also, News Corp, *Submission 5*, p. 1; Australian Music Publishers Association, *Submission 11*, p.1; Phonographic Performance Company of Australia, *Submission 21*, p. 1.

that they, in essence, take steps to remove infringing content when they are notified.³

2.5 Secondly, it was stated that the proposed extension balances the interests of rights holders with those of important educational institutions. The Phonographic Performance Company of Australia stated that:

...there is a distinction between 'service providers' that are simply conduits to the provision of content and those that have the ability to exercise control and monetise the content on their platforms. The expansion of the safe harbour scheme as set out in the Bill to cover libraries, organisations assisting persons with a disability, archives, key cultural and educational institutions means that commercial operators are not able to undermine the operation of existing digital business models which are licensed on a voluntary basis. The Bill balances the interests of rights holders with those of the important educational and cultural institutions included within the Bill.⁴

2.6 Thirdly, it was argued that the proposed safe harbour scheme provides an efficient and affordable redress for online copyright infringement, as it enables creators to take action against online infringement in a cost-effective and efficient manner.⁵

2.7 Finally, it was argued that the bill 'delivers a scheme that should not distort the commercial market for content and distribution of that content' as the entities to which the bill applies safe harbour do not benefit financially from the content on their networks.⁶ This issue was also addressed by MRA which stated that safe harbour should not be used as a shield to distort commercial negotiations. It noted that in overseas jurisdictions with safe harbour schemes, the misapplication of the schemes has undermined the commercial environment for online music services. This has led to creators, including songwriters, independent recording artists and labels, not being paid for their creative output at market rates, or sometimes not at all. MRA concluded:

APRA AMCOS members and ARIA members should have their legitimate expectations that they will be rewarded for their work recognised and supported through the legislative framework. This bill does that, which is why the music community supports its passage as drafted. This is an innovative solution, and it reflects trends around the world.⁷

3 Ms Kate Haddock, Chair, Australian Copyright Council, *Committee Hansard*, 6 March 2018, p. 12. See also, Ms Vanessa Hutley, General Manager, Music Rights Australia, *Committee Hansard*, 6 March 2018, p. 16.

4 Phonographic Performance Company of Australia, *Submission 21*, pp. 1–2.

5 Australian Publishers Association, *Submission 17*, p. 2.

6 News Corp, *Submission 5*, p. 1. See also, ARIA, *Submission 23*, p. 1; Music Rights Australia, *Submission 36*, p. 2.

7 Ms Vanessa Hutley, General Manager, Music Rights Australia, *Committee Hansard*, 6 March 2018, p. 16.

2.8 Libraries and educational institutions also supported the extension of the safe harbour scheme as proposed in the bill. It was submitted that the bill would:

- enable the implementation of reasonable, efficient and effective remedies for potential online infringements;
- clarify legal requirements and provide protection and certainty; and
- lower the risk involved with digital engagement projects.⁸

Concerns that the proposed amendments will not achieve the policy objective

2.9 Some submitters argued that the proposed amendments may not achieve the Government's policy objective. For example, Redbubble argued that there will be issues of 'practicality' in the distinction being drawn between education/not-for-profit entities proposed to receive safe harbour protection and commercial online service providers. Redbubble submitted that it remains uncertain whether projects between the educational/not-for-profit sector and commercial entities would receive safe harbour protection under the current proposals. Further, Redbubble stated that it will create a complex and confusing system for the 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 judgements as to whether the safe harbour process would be applied from one platform to the next.⁹

2.10 The Australian Digital Alliance, while supporting the proposed amendments as 'an important first step', argued that it will not provide a simple, uniform, affordable and non-litigious system for having infringing material online removed. The Australian Digital Alliance stated:

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 an 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.¹⁰

8 National and State Libraries Australasia, *Submission 6*, p. 1; Universities Australia, *Submission 7*, p. 2; Australian Libraries Copyright Committee, *Submission 27*, p. 2.

9 Redbubble, *Submission 18*, p. 6. See also, Australian Libraries Copyright Committee, *Submission 27*, p. 3.

10 Australian Digital Alliance, *Submission 34*, p. 7.

2.11 The Redbubble's collaboration with the State Library Victoria was cited as an example of a project that may not proceed under the proposed amendments.¹¹

2.12 The Australian Information Industry Association (AIIA) argued that there is no point to limiting safe harbour in Australia as most Australian content is hosted on platforms that already operate within other safe harbour regimes. The AIIA stated:

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. Given 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.¹²

Response from the Department of Communications and the Arts

2.13 The Department of Communications and the Arts (the department) responded to concerns raised by Redbubble and others in relation to collaborations with institutions. The department responded that:

The intention is that the organisations that fall within the definition of service providers and undertake activities comply with the conditions, so, if a university does that and it's in partnership with, say, a private sector organisation, if it is doing it on its system or network, it will be covered as long as it complies with those conditions. In the State Library example, if something was being operated on their network or system and they complied with the conditions, they would be able to rely on safe harbour. That's the policy intention. Whether that affects commercial relationships is not something that the bill deals with.¹³

Stakeholder views on an extension of the safe harbour scheme to all online service providers

2.14 As well as comments on the bill, submitters provided their views on the possible extension of the safe harbour scheme to all online service providers. The committee notes that there have been several consultations on expanding the safe harbour regime over the last 10 years, as well consideration by the Productivity Commission in its report on Intellectual Property Rights Arrangements.¹⁴ The

11 Mr Martin Hosking, Chief Executive Officer, Redbubble Limited, *Committee Hansard*, 6 March 2018, p. 2; Ms Jessica Coates, Executive Officer, Australian Digital Alliance, *Committee Hansard*, 6 March 2018, p. 21.

12 Australian Information Industry Association, *Submission 31*, p. 1. See also, Optus, *Submission 13*, p. 1.

13 Ms Emma Shadbolt, Assistant Director, Department of Communications and the Arts, *Committee Hansard*, 6 March 2018, p. 36.

14 Productivity Commission, *Intellectual Property Rights Arrangements*, 2016.

department also undertook public consultations on an exposure draft of the Copyright Amendment (Disability Access and Other Measures) Bill (the DAOM bill) released in 2015. The DAOM bill proposed amendments to the safe harbour scheme. The amendments were removed from the DAOM bill before being introduced into the Parliament in March 2017. The Government then asked the department to undertake further consultation on the extension of the safe harbour scheme.¹⁵

2.15 As a consequence of these reviews and consultations, the views of those supporting, and those not supporting, the extension of the safe harbour scheme have been well canvassed. The following provides an overview of the issues raised in relation to further safe harbour reform during the bill inquiry.

Support for an extension of the safe harbour scheme

2.16 A range of submitters commented that the proposed amendments are only part of the solution to address perceived problems with Australia's copyright safe harbour scheme. These submitters supported the extension of the safe harbour scheme to online providers and provided a range of reasons for this support.

2.17 It was argued that an extension of the safe harbour scheme will provide legal certainty and protection.¹⁶ The Australian Digital Alliance commented that while the safe harbour laws remain incomplete, Australian technological companies will continue to face increased legal risk and associated costs.¹⁷ Digital Rights Watch added that:

Without a safe harbour regime, service providers are left to their discretion to make judgements about whether content should be removed or not. This is a system with little transparency and almost no due process protections.¹⁸

2.18 Professor Nicholas Suzor also noted that Redbubble and other organisations have indicated that they face difficulties in dealing with the uncertainty of Australian law.¹⁹ Redbubble provided further evidence on this point and noted the proceedings brought by the Pokemon Company International against Redbubble. While the judgment found copyright infringement against Redbubble, only nominal damages of \$1 were awarded. The award was made on the basis that Redbubble's business was 'not directed to profit from infringing of intellectual property' and further that 'Redbubble was seeking to comply with its obligations under law and had processes in

15 Department of Communications and the Arts, *Submission 25*, pp. 2–3. The department provided the list of stakeholders it consulted with and/or received representations from in mid-2017. See Department of Communications and the Arts, *Answer to question on notice No. 1*.

16 National Archives of Australia, *Submission 14*, p. 1; National and State Libraries Australia, *Submission 6*, p. 2; Universities Australia, *Submission 7*, p. 2; DIGI, *Submission 38*, p. 4.

17 Australian Digital Alliance, *Submission 34*, p. 12.

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

19 Professor Nicholas Suzor, *Committee Hansard*, 6 March 2018, p. 9.

place to prevent and mitigate breaches which were reasonable and defensible'. Redbubble concluded:

...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.²⁰

2.19 Submitters also argued that the system for the removal of infringing content is complex and costly and will remain so unless safe harbour is extended.²¹ DIGI commented that an extension of the scheme would benefit rights holders by creating a simple and consistent system which provides them with an efficient way to seek the removal of infringing content online without going to court.²² The Australian Libraries Copyright Committee stated:

A localised and universally applicable anti-piracy notice and takedown system for addressing local copyright infringements would increase clarity and reduce costs both for our members and for Australian creators.²³

2.20 Another issue raised by DIGI was that an extension of the safe harbour scheme would protect consumer rights by providing a process (the report and takedown scheme) through which to challenge incorrect claims of copyright infringement.²⁴

2.21 Other arguments put forward in support of an extension of the safe harbour scheme centred around the assistance that would be provided to start-ups and other companies wishing to compete on the world stage and the boost it would provide to the growth of the digital industry in Australia. For example, DIGI commented that, without an extension of the safe harbour scheme, Australian start-ups and service providers will be significantly disadvantaged.²⁵

2.22 It was argued that one barrier to Australian online businesses being more competitive is the lack of protection afforded by a comprehensive safe harbour scheme. The Asia Internet Coalition commented that with 'a less comprehensive safe harbour regime that currently excludes online service providers, Australia is a riskier destination for content hosting since local online innovations do not receive legal protection in return for fighting piracy'.²⁶ Professor Kimberlee Weatherall, Professor

20 Redbubble, *Submission 18*, p. 7.

21 Australian Digital Alliance, *Submission 34*, p. 6.

22 DIGI, *Submission 38*, p. 3.

23 Australian Libraries Copyright Committee, *Submission 27*, p. 1. See also, Asia Internet Coalition, *Submission 19*, p. 2.

24 DIGI, *Submission 38*, p. 3.

25 DIGI, *Submission 38*, p. 2.

26 Asia Internet Coalition, *Submission 19*, p. 2. See also, Australian Digital Alliance, *Submission 34*, p. 9; Ms Nicole Buskeiwicz, Managing Director, DIGI, *Committee Hansard*, 6 March 2018, p. 27.

of Law, University of Sydney, added that being an internet intermediary in Australia is riskier in terms of copyright law than in comparative jurisdictions:

Developments in Australian case law...have made clear that the risks of liability for most internet intermediaries (beyond internet access providers) are real. There have also been developments overseas although, for the most part, they have not changed the fundamental position: comparable jurisdictions make safe harbours available to many internet intermediaries, in circumstances where Australian intermediaries—private and public—risk copyright liability.²⁷

2.23 A number of submitters argued that the legal certainty provided by safe harbour is an enabler of innovation, which is critical in the Australian technology sector and to promoting international competitiveness.²⁸ Redbubble expanded on this argument and noted the growth of companies such as Google, Facebook and Amazon and stated that the US culture of innovation and competition has been critical to this success. Google concurred, stating that YouTube 'literally would not exist today but for the US safe harbour scheme'.²⁹

2.24 However, Redbubble commented that the current Australian copyright laws were created for a pre-internet world and not only do they not work in the age of the internet but also 'do not deal with the reality of user generated contents—UGC'.³⁰

2.25 Redbubble argued that there was an opportunity cost to Australia of a limited safe harbour scheme with start-ups seeking to move offshore to take advantage of the safe harbours in other jurisdictions. Redbubble stated that 'Australia cannot even begin to count the loss from such foregone opportunities, but undoubtedly it will continue to slip further down the innovation ranks'.³¹

2.26 DIGI also commented that the start-up sector had been 'quite vocal' on the issue of safe harbour and had stated that reform of the safe harbour scheme was 'up there with things like R&D tax incentives and 457 visas, in terms of the importance to the industry thriving and surviving in Australia'. DIGI pointed to examples of the importance of technology companies to Australia and concluded that 'the impacts and the consequences of not reforming the safe harbour scheme, and including all online

27 Professor Kimberlee Weatherall, *Submission 37*, p. 1. See also, Redbubble, *Submission 18*, p. 7; Startup Aus, *Submission 22*, p. 1.

28 See, for example, Google, *Submission 24*, p. 2; Australian Digital Alliance, *Submission 34*, pp. 8–9; OneGov, *Submission 33*, p. 5.

29 Mr Michael Cooley, Public Policy and Government Relations Counsel, Google Australia, *Committee Hansard*, 6 March 2018, p. 28.

30 Mr Martin Hosking, Chief Executive Officer, Redbubble Limited, *Committee Hansard*, 6 March 2018, p. 1.

31 Mr Martin Hosking, Chief Executive Officer, Redbubble Limited, *Committee Hansard*, 6 March 2018, p. 3.

service providers, including the tech sector, will have a devastating impact upon Australian innovation'.³²

2.27 It was also submitted that an extended safe harbour scheme would bring Australia into line with many of our major trading partners, would align with best practice and would provide a level playing field with international counterparts.³³ Google Australia commented:

By excluding the commercial sector from our safe harbour scheme as currently proposed in this bill, Australia is looking to adopt a model that exists nowhere else in the world. This will place Australian start-ups and online businesses at a big disadvantage to their competitors in countries that have strong frameworks, such as the United States, Canada, the European Union, the UK, Singapore, South Korea and Japan.³⁴

2.28 Similarly, the Australian Digital Alliance stated:

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.³⁵

Concerns relating to further extension of the safe harbour scheme

2.29 The committee also received evidence from those who did not support an extension of the safe harbour scheme beyond the measures proposed by the bill. These submitters argued that safe harbours should not be available to content aggregators, search engines and social media platforms.³⁶ For example, the Australian Society of Authors stated:

The ASA is pleased that the Bill does not extend safe harbour to other kinds of service providers such as content aggregators, search engines and social media platforms. As you would know, the creative sector has vigorously opposed the extension of safe harbour to commercial platforms.³⁷

2.30 APRA AMCOS cautioned against an extension of the safe harbour scheme to intermediaries, particularly to those entities which derive a profit from commercial exploitation of music by way of their services, as this would jeopardise rights holders'

32 Ms Nicole Buskiewicz, Managing Director, DIGI, *Committee Hansard*, 6 March 2018, pp. 30-31.

33 OneGov, *Submission 33*, p. 5.

34 Mr Michael Cooley, Google Australia, *Committee Hansard*, 6 March 2018, pp. 27–28.

35 Australian Digital Alliance, *Submission 34*, p. 10.

36 Arts Law Centre of Australia, *Submission 3*, p. 2; Village Roadshow; *Submission 10*, p. 1; Copyright Agency, *Submission 16*, p. 2.

37 Australian Society of Authors, *Submission 4*, p. 1.

ability to realise returns on their creative and financial investment. APRA AMCOS argued that this bill should represent the end of the Government's reforms in this area.³⁸

2.31 The Australian Copyright Council contended that there would be four major detrimental consequences should safe harbour be extended to all online platforms which are not passive carriers:

- for those platforms where licences to use copyright material are available, the incentive to enter into a licence agreement would be significantly diminished;
- online platforms would not have to bear the risk of publication which other publishers bear—this would give online platforms an unfair advantage over traditional publishers;
- when the publisher does not bear the risk of publication, all of the risk is placed on the author of the infringing content. That means that, although the publisher has profited from the publication of the content, it is only the uploader who is liable to pay damages; and
- the only stakeholder who really suffers in the infringement scenario is the original copyright owner.³⁹

2.32 The Australian Copyright Council concluded:

The safe harbour system, when it's applied to content platforms that are not passive providers, including those that generate billions of dollars a year in revenue, encourages wilful blindness on the part of the platform proprietor. The only stakeholder who bears a risk is the creative copyright owner, which is why we urge that the bill remains in its current form.⁴⁰

2.33 APRA AMCOS also pointed to the licensing arrangements already in place and explained:

There are simple, efficient, collective licensing solutions that are available to the online platforms that we're discussing today—and I'm not just talking about the YouTubes and the Facebooks of this world; I'm talking about the smaller platforms. APRA AMCOS, for its part, has a tailored licence that is aimed at start-up organisations, with reduced licence fees, simplified reporting arrangements, phase-in rates—all for the purpose of providing a simple licensing solution, rather than those platforms getting a free kick

38 APRA AMCOS, *Submission 12*, p. 2.

39 Ms Kate Haddock, Chair, Australian Copyright Council, *Committee Hansard*, 6 March 2018, p. 12.

40 Ms Kate Haddock, Chair, Australian Copyright Council, *Committee Hansard*, 6 March 2018, p. 13.

under an exception to the Copyright Act. So that's really the position that our members have.⁴¹

2.34 Submitters opposed to the further extension of the safe harbour scheme also questioned the argument that this was a necessary step to ensure continued innovation in the digital sector. MRA argued that it is an 'unproven premise' that to do so is a pre-requisite for stimulating digital growth in Australia.⁴² MRA also stated that it 'did not believe that this is a discussion between copyright owners and innovation' rather it is a 'question of rewarding adequately in a digital environment and not using the safe harbour as a shield to distort commercial negotiations'.⁴³

2.35 In response to comments regarding possible complexity that may be introduced as a consequence of the limited safe harbour proposed by the amendments, the Australian Copyright Council stated that:

As to the confusion and complexity of the law, our view is that the copyright law is not a textbook. It's not a text that can be analysed by academics; it's a practical working manual for people who make a living out of copyright material. The systems as they operate in real life and in commercial practice can be complex, but the people who operate the systems are expert. Users of copyright material, particularly online, benefit from very widespread licensing arrangements that ensure that most activity that occurs online through the major content providers is not infringing. Most of those commercial relationships are appropriate and amicable, in my experience.⁴⁴

2.36 MRA also commented on the United States safe harbour system—US Digital Millennium Copyright Act of 1998 (DMCA)—and noted that it is currently being reviewed. It went on to state that over time the 'legislation has been read down through significant litigation in such a way that it now acts to distort the market'. In its view:

...the US is struggling with the very issue which we think this bill has resolved. There's a commercial environment which has a different dynamic and a different place to have discussions, which is through licensing, and then there are the passive and automatic groups, such as the classes identified here in this bill.⁴⁵

41 Mr Jonathan Carter, Head of Legal, Corporate and Policy, APRA AMCOS, *Committee Hansard*, 6 March 2018, p. 17.

42 Music Right Australia, *Submission 36*, Attachment 1, Exposure draft submission, p. 4.

43 Ms Vanessa Hutley, General Manager, Music Rights Australia, *Committee Hansard*, 6 March 2018, p. 18.

44 Ms Kate Haddock, Chair, Australian Copyright Council, *Committee Hansard*, 6 March 2018, p. 14.

45 Ms Vanessa Hutley, General Manager, Music Rights Australia, *Committee Hansard*, 6 March 2018, p. 18.

Safe harbour schemes and piracy

2.37 A major issue raised in evidence was the impact of safe harbour on efforts to combat piracy. Submitters provided a range of views in relation to piracy with some submitters argued that safe harbour limits piracy.

2.38 Google, for example, stated that safe harbour encourages a system of shared responsibilities that actually increases the ability of all actors to fight piracy.⁴⁶ OneGov, added that extending safe harbour 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. OneGov concluded:

Safe harbour is a sensible solution that allows content creators and policy makers time to develop strategies against piracy that tackle the issue holistically.⁴⁷

2.39 Other submitters pointed to the DMCA as an example of a safe harbour regime that has:

...led to further ongoing collaborative efforts to improve the efficiency and effectiveness of the DMCA notice-and-take-down system with voluntary measures...Comprehensive safe harbour protections make collaboration and innovation in tools to address online piracy possible.⁴⁸

2.40 Redbubble commented that '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'.⁴⁹ The Australian Digital Alliance expanded on this point and commented that a comprehensive safe harbour system allows those with the fewest resources to understand how to combat piracy and to take legal action. The Australian Digital Alliance concluded:

The whole point of a cover-the-field safe harbour system is to ensure that everybody is encompassed within the same system, not to pick and choose those few big people who can afford it and can work in the system and leave a system that excludes everybody else. This is why licensing is great, but it doesn't replace a proper legislative system.⁵⁰

46 Mr Michael Cooley, Google Australia, *Committee Hansard*, 6 March 2018, p. 28.

47 OneGov, *Submission 33*, p. 5. See also, Australian Information Industry Association, *Submission 31*, p. 1.

48 Google, *Submission 24*, pp. 5–6.

49 Redbubble, *Submission 18*, p. 3. See also, Mr Martin Hosking, Chief Executive Officer, Redbubble, *Committee Hansard*, 6 March 2018, p. 2.

50 Ms Jessica Coates, Executive Officer, Australian Digital Alliance, *Committee Hansard*, 6 March 2018, p. 22.

2.41 However, other submitters did not agree that safe harbour is beneficial to limiting piracy. MRA contended that music rights holders in Australia have not benefitted fairly or proportionately from the digital music consumption because overly broad safe harbour schemes have distorted the markets. MRA stated that:

Uncertainty around the proper application of safe harbours has emboldened services that make available user-uploaded content to take an "act first, negotiate later" approach, building large music services without a licence, fundamentally distorting the negotiation process. If they do enter into licence negotiations (as opposed to carrying on business in the hope they will not be sued), the choice for rights holders is to

1. accept the terms on offer and get some return for the use of their music;
2. rely on ineffective notice and takedown procedures provided in safe harbour legislation to try to prevent their content being distributed without a licence; or
3. sue the service under an uncertain legal framework and delay any chance of getting income from their music.⁵¹

2.42 As to the effectiveness of notice to takedown procedures to prevent piracy, the Arts Law Centre Australia noted the burden placed on rights holders to monitor and issue takedown notices relating to reposting of infringing content once a take-down notice has been issued. It submitted service providers are better placed to undertake this activity than copyright holders.⁵²

2.43 MRA also considered notice and takedown systems are ineffective against piracy, noting that most service providers remove only the specific URL link notified in the takedown notice without taking any further action. MRA stated:

This makes the process ineffective because (a) even if one URL link or one copy of an infringing file is removed, there are typically many thousands of other URL links to, or other copies of, the same infringing title that remains on line; and (b) content or links once removed are often quickly reposted and most service providers do not take steps to prevent this.⁵³

2.44 MRA also argued that pirate sites benefit under the notice and takedown regime:

Under the guise of the notice and take down policy, pirate sites purport to operate legally, knowing that rights holders will have to incur huge expenses in suing them to establish that safe harbours do not apply and/or engage in mass notification programs which are not effective in preventing

51 Music Rights Australia, *Submission 36*, Attachment 1, Exposure draft submission, p. 6.

52 Arts Law Centre Australia, *Submission 3*, p. 3. See also, Australian Society of Authors, *Submission 4*, p. 2.

53 Music Rights Australia, *Submission 36*, Attachment 1, Exposure draft submission, p. 8.

infringement. The problem is compounded by uncertainty over the scope of safe harbours, making litigation complex, lengthy, and costly.⁵⁴

The Government's approach to safe harbour reform

2.45 The department submitted that the Government has taken an incremental approach to safe harbour reform. It noted that by taking the first step to extend safe harbour to educational and cultural institutions and organisations assisting people with a disability, the Government will ensure that 'these sectors, which provide beneficial services to the Australian community, are afforded protection sooner rather than later'.⁵⁵

2.46 In relation to further reform, the department observed that 'a blanket extension still remains a highly contested reform' with polarised views of stakeholders leading to a lack of consensus on a full extension. The department added that there was more consensus in extending the scheme as proposed by the bill.⁵⁶ The committee was informed that the department had undertaken consultations with stakeholders in order to 'try and understand and unpick all of the issues around such a complex issue'.⁵⁷ It would also continue to consult stakeholders.

2.47 The department also stated that:

Incremental reform also allows the Government to develop conditions for safe harbours in synchrony with international developments to ensure that our scheme is effective and consistent with our international counterparts.⁵⁸

2.48 The department also commented on the argument that safe harbour supported innovation. The department noted that there are a number of countries which do not have safe harbour but still have innovation. It added that it had received 'disputed evidence about how important safe harbour is to innovation' and noted that there are other factors at play in creating an environment for innovation which business needs to take into account.⁵⁹ The department went on to state that it had looked for 'strong evidence that linked safe harbour to innovation', however:

We didn't find that direct linkage. There's some evidence about a general copyright approach. I know that there have been some studies that have looked at flexible exceptions and their contribution to innovation. But we

54 Music Rights Australia, *Submission 36*, Attachment 1, Exposure draft submission, p. 8.

55 Department of Communications and the Arts, *Submission 25*, p. 5.

56 Dr Carolyn Patteson, First Assistant Secretary, Content, Department of Communication and the Arts, *Committee Hansard*, 6 March 2018, p. 35.

57 Dr Carolyn Patteson, First Assistant Secretary, Content, Department of Communication and the Arts, *Committee Hansard*, 6 March 2018, p. 37.

58 Department of Communications and the Arts, *Submission 25*, p. 5.

59 Ms Kirsti Haipola, Legal Director, Department of Communication and the Arts, *Committee Hansard*, 6 March 2018, p. 37.

did not find any evidence that directly linked safe harbour to an increase in innovation.⁶⁰

2.49 The department also commented on the reviews of both the US and EU safe harbour schemes. While agreeing that neither of these reviews are necessarily looking at pulling back on who the safe harbours apply to, it commented that 'what has happened overseas and what is in place overseas is important, but we need to look at what is appropriate and fit for purpose in Australia'. The department added that:

The complexity of the issues and the really diverse views and polarised views of stakeholders makes it a really difficult path to navigate, and that is why we are really trying to take what is a balanced approach where there is an openness to extending safe harbour.⁶¹

Drafting issues

2.50 Submitters raised drafting issues which they argued may lead to unintended consequences.

2.51 First, the Law Council of Australia (LCA) argued that the wording of subsection 116ABA(1) (definition of a service provider) is unclear as it can be read exclusively or inclusively. In addition, the LCA commented on the wording of subsection 116ABA(2). This subsection is intended to clarify that, if a body administering the institutions covered by the definition of service provider in subsection 116ABA(1) has other functions unrelated to these institutions, those functions will not be covered by the safe harbour scheme.⁶² The LCA noted that subsection 116ABA(2) provides that only activities done because of a 'relationship' between the administering body and the institution fall within the safe harbour. The LCA considers the concept of 'relationship' is unclear and stated that only activities done because of a 'relationship' fall within the safe harbour.⁶³

2.52 The LCA recommended that the entities to be included within the definition of 'service providers' and which activities are to be covered be clarified.⁶⁴

2.53 Secondly, a number of submitters raised concerns with the use of 'by' rather than 'by or on behalf of' in the legislation relating to the institutions intended to be covered by the safe harbour scheme. Universities Australia argued that this drafting creates uncertainty:

60 Ms Kirsti Haipola, Legal Director, Department of Communication and the Arts, *Committee Hansard*, 6 March 2018, p. 38.

61 Dr Carolyn Patteson, First Assistant Secretary, Content, Department of Communication and the Arts, *Committee Hansard*, 6 March 2018, p. 39.

62 EM, p. 7.

63 Law Council of Australia, *Submission 35*, p. 2.

64 Law Council of Australia, *Submission 35*, p. 2.

...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.⁶⁵

2.54 The Copyright Advisory Group to the COAG Education Council recommended that the bill be amended to make it clear that the safe harbour extends to activities carried out by a third party 'on behalf' of an entity that is a service provider under the bill.⁶⁶ The LCA also supported this approach and commented that 'it would allow public interest organisations to innovate entirely in-house, but also then use services and products developed in the private sector'.⁶⁷

Committee view

2.55 The committee notes that the Government has had the benefit of the outcomes of a number of reviews of the extension of safe harbour and the extensive consultation by the department on this matter. These reviews and consultations highlighted the highly polarised views and lack of consensus on further safe harbour reform. Similarly, the committee received conflicting evidence. In particular, the committee notes the evidence from those arguing that safe harbour reform will benefit innovation. However, in its evidence to the committee, the department stated that it did not find evidence to support this argument.

2.56 Given the divergence of stakeholder views and the complexity of the issues being considered, the committee supports the Government's incremental approach to safe harbour reform. The proposed amendments will ensure that educational and cultural institutions and organisations assisting people with a disability will be afforded protection immediately. The committee considers this to be a balanced and reasonable approach. The committee also notes and appreciates the reassurance that the department will continue its consultation with stakeholders.

2.57 In addition, the committee notes the comments of submitters relating to the use of 'by' rather than 'by and on behalf of' in the bill. The committee is of the view that the department should consider whether legislative certainty is required in relation to this matter.

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

66 Copyright Advisory Group to the COAG Education Council, *Submission 9*, p. 3.

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

Recommendation 1

2.58 The committee recommends that the Senate pass the bill.

**Senator Jonathan Duniam
Chair**

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 Australia¹ 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 Australia² '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 SBS³ 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 Australia⁴ 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

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.⁵

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.⁶

1.19 Google⁷ 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

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

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

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

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.⁸

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

Separating out safe harbours 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 harbours 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 harbours for commercial platforms.⁹

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.¹⁰

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

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.¹¹

1.23 The Australian Information Industry Association¹² '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 Alliance¹³ '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.¹⁴

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.¹⁵

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 Incorporated¹⁶ 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.¹⁷

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.¹⁸

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.¹⁹

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).²⁰

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.²¹

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

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.²²

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."²³

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.²⁴

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

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.²⁵

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.

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**

Appendix 1

Submissions, tabled documents and answers to questions on notice

Submissions

- 1 Association of Artist Managers Australia
- 2 Council of Australian University Librarians
- 3 The Arts Law Centre of Australia
- 4 The Australian Society of Authors
- 5 News Corp Australia
- 6 National and State Libraries Australasia
- 7 Universities Australia
- 8 The Coalition of Major Professional and Participation Sports
- 9 Copyright Advisory Group
- 10 Village Roadshow Limited
- 11 Australian Music Publishers Association Limited
- 12 APRA ACMOS
- 13 Optus
- 14 National Archives of Australia
- 15 Australian Copyright Council
- 16 Copyright Agency
- 17 Australian Publishers Association
- 18 Redbubble Limited
- 19 Asia Internet Coalition
- 20 Special Broadcasting Service (SBS)
- 21 Phonographic Performance Company of Australia
- 22 StartupAUS
- 23 Australian Recording Industry Association (ARIA)
- 24 Google Australia
- 25 Department of Communications and the Arts
- 26 Digital Rights Watch
- 27 Australian Libraries Copyright Committee
- 28 Free TV Australia

29	Re:Create
30	Computer and Communications Industry Association
30.1	Supplementary to Submission 30
31	Australian Information Industry Association
32	Australian Film and TV Bodies
33	OneGov
34	Australian Digital Alliance
35	Business Law Section, Law Council of Australia
36	Music Rights Australia
37	Professor Kimberlee Weatherall
38	Digital Industry Group Inc (DIGI)
39	99designs

Tabled documents

APRA ACMOS – Article, SJ Liebowitz, 'Economic analysis of safe harbour provisions' (public hearing, Melbourne, 6 March 2018)

Australian Digital Alliance – Table: 'How risky is internet intermediary business?' (public hearing, Melbourne, 6 March 2018)

Answers to questions on notice

Department of Communications and the Arts – Answers to questions taken on notice, public hearing, Melbourne, 6 March 2018 (received 9 March 2018)

DIGI – Answers to questions on notice, public hearing, Melbourne, 6 March 2018 (received 9 March 2018)

Australian Digital Alliance – Answers to questions on notice, public hearing, Melbourne, 6 March 2018 (received 15 March 2018)

Australian Digital Alliance – Amended answers to questions on notice, public hearing, Melbourne, 6 March 2018 (received 16 March 2018)

APRA ACMOS – Answer to question on notice, public hearing, Melbourne, 6 March 2018 (received 7 March 2018)

Appendix 2

Public hearing

Tuesday, 6 March 2018 – Melbourne

Redbubble

Mr Martin Hosking, Chief Executive Officer
Mr Paul Gordon, In-house Legal Counsel

Digital Rights Watch—via teleconference

Associate Professor Nicholas Suzor

Australian Copyright Council

Ms Kate Haddock, Chair
Mr Grant McAvaney, Chief Executive Officer

Music Rights Australia

Ms Vanessa Hutley, General Manager

APRA ACMOS

Mr Jonathan Carter, Head of Legal, Corporate and Policy

Australian Digital Alliance

Ms Jessica Coates, Executive Officer

Australian Information Industry Association (AIIA)—via teleconference

Ms Kim Hicks, Acting General Manager, Policy and Advocacy

DIGI

Ms Nicole Buskiewicz, Managing Director

Google Australia

Mr Michael Cooley, Public Policy and Government Relations Counsel

Department of Communications and the Arts

Dr Carolyn Patteson, First Assistant Secretary, Content
Ms Kirsti Haipola, Legal Director, Copyright Law
Ms Emma Shadbolt, Assistant Director, Copyright Law

