

# Senate Environment and Communications Legislation Committee

30 January 2018

## Copyright Amendment (Service Providers) Bill 2017

Thank you for the opportunity to make a submission to this inquiry. We are academics who study copyright and the digital economy, and we write with the support of Digital Rights Watch, a national charity whose mission is to ensure that Australian citizens are equipped, empowered and enabled to uphold their digital rights.

**We strongly support the extension of the safe harbours in the Bill.** The organisations that will benefit from the certainty that the copyright safe harbours provide have a clearly demonstrated need, and this proposal is long overdue.

However, we believe that the Bill should be amended so that the term ‘Service Provider’ is not defined restrictively.<sup>1</sup> Currently, 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. We believe that ‘Service Provider’ should be understood according to its ordinary meaning, and extend to all of Australia’s internet hosts and platform providers.

Extending the safe harbours to all service providers benefits all parties:

- 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 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.

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<sup>1</sup> This was the original proposal under the exposure draft of the Copyright Amendment (Disability Access and Other Measures) Bill 2016.

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## **1. The safe harbours should be extended to all online service providers.**

The safe harbours provide a way for people to ask online service providers to remove content that infringes copyright. By creating a takedown regime, the safe harbours provide an effective remedy to copyright owners that clearly and explicitly sets out the steps that a content host must take to remove infringing content and avoid liability. This system provides critical certainty for content hosts when third parties upload material to their networks that infringes copyright.

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.

The lack of a full safe harbour imposes a significant cost on Australian innovation. Many foreign online services that allow users to upload content rely on the safe harbours to limit their legal risk. This is particularly important for early-stage startups experimenting with new technologies and building new markets. Without safe harbours, Australian technology entrepreneurs face greater legal risk than their competitors, and this contributes to a hostile environment that drives home-grown innovators offshore. The so-called Australian "brain drain" is worsened by a restrictive and discouraging regulatory environment. Australian technology startups should have the chance to experiment and grow in a supportive, reduced-risk environment. The safe harbour provides a way to help startups manage their risk while at the same time providing effective protections for copyright owners.

## **2. Regulation enhances due process safeguards for individuals and copyright owners**

Australian law should clearly set out the procedures that technology companies are expected to follow to remove content that infringes copyright. Currently, because most Australian hosts are not covered by the safe harbours, there are no legal due process safeguards to protect copyright owners or ordinary Australians who upload content to Australian digital services. In an age where major tech companies are responsible for making decisions that have real impact on freedom of speech for all internet users,<sup>5</sup> strong due process safeguards are important to protect legitimate businesses and the human rights of individuals.

The safe harbour procedures set out in copyright legislation and regulations provide a balanced procedure for hosts to follow to remove content that is allegedly infringing - a procedure which takes into account the interests of copyright owners and the individuals who post content. The US safe harbour regime works at a very large scale -- over 80 million takedown requests each month. Most of these are valid, but mistakes are inevitably made, both by automated detection systems and by claimants who try to use copyright law to stifle

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<sup>5</sup> See David Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (A/HRC/32/38, United Nations, Human Rights Council, 11 May 2016) <<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/PrivateSectorinthedigitalage.aspx>>.

competition and freedom of speech.<sup>6</sup> There are many examples of these errors: a Perth-based media business was forced to forfeit all their revenue from a clearly lawful viral political satire in the leadup to the 2012 Election; student journalists reporting on sporting events have had their videos removed; just this month a South Australian musician had their music blocked because of an incorrect claim over a portion of 'white noise' static lawfully included in their music.<sup>7</sup>

These mistakes come at a significant cost for ordinary users sharing their lives and small businesses trying to build a following on social media. The safe harbour scheme provides a counter-notice mechanism to ensure that content is not restricted without justification. While this mechanism can be further improved, it is a critical component of a legitimate takedown regime that works at the massive scale of the internet.

A clear procedure for takedowns is much better than the status quo for all parties. For Australian creators and copyright owners, extended safe harbours provide an opportunity to more effectively protect and manage their creations on the Internet, without needing to resort to costly court actions to assert their rights. Australian internet users are likewise given a system that clearly conveys to them when they have infringed another's right, and offers logical and easy-to-use means for disputing a claim where necessary. As long as the safe harbour scheme continues to exclude the bulk of Australian internet businesses, both copyright owners and users are deprived of the benefits of these regulated procedures.

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<sup>6</sup> See Jennifer M Urban, Joe Karaganis and Brianna L Schofield, 'Notice and Takedown in Everyday Practice' (2016) <<http://papers.ssrn.com/abstract=2755628>>.

<sup>7</sup> See Chris Baraniuk, 'White noise video on YouTube hit by five copyright claims', BBC News (5 January 2018) <<http://www.bbc.com/news/technology-42580523>>.