

Asia Internet Coalition Submission on the Copyright Amendment (Service Providers) Bill 2017

Overview

The Asia Internet Coalition (AIC) is an industry association made up of leading internet and technology companies. The AIC seeks to promote the understanding and resolution of Internet policy issues in the Asia Pacific region. Our members are Apple, Expedia, Facebook, Google, Line, LinkedIn, PayPal, Rakuten, Twitter and Yahoo (Oath).

For the Asia Internet Coalition this is the first time that comments are being submitted to the Australian Government and the reason of doing so is because, as an industry, we believe that bringing Australia into alignment with Asia and Global best practices it is extremely important for Australia and for the industry. There are two main reasons that we want to highlight that support the above mentioned:

1. Broad safe harbour laws will not be detrimental to local businesses, it has actually been proven to work effectively in some countries, as Singapore and South Korea – balancing the interests of all stakeholders.
2. There is a link between effective safe harbours and the success rate of Internet startups, that needs to be taken in consideration to increase startup success rates and expected profits.

The Asia Internet Coalition (AIC) welcomes the opportunity to respond to the Senate Environment and Communications Legislation Committee on the Copyright Amendment (Service Providers) Bill 2017 (“Bill”). We laud the amendments that will extend the operation of the safe harbour scheme to a broader range of service providers, including educational institutions, libraries, archives, key cultural institutions and organisations assisting persons with a disability. These are important changes that will provide regulatory certainty for some Australian entities.

However, the AIC believes that if it is to have a truly meaningful impact on, adapting Australia to the modern digital economy and benefit Australia consumers, the expansion of the safe harbor regime must embrace all online service providers, as the private sector represents one of the most important channels through which Australian consumers access information. AIC supports such an expansion because it will help Australian businesses, creators and consumers by reducing regulatory risk for new innovations, ensure that Australia remains a strong destination for digital investment, expanding the options for local content owners, ensuring all consumers have clear protections under the scheme, and bring Australia into alignment with best practices in Asia and globally. We also believe that it is also necessary if Australia is to fully implement its international obligations under the US-Australia Free Trade Agreement.

When covered under safe harbour protections, online service providers are incentivised to develop and enforce strong notice and takedown regimes that enable content owners to claim

ownership of their content and provide options to remove it or potentially monetise it. Furthermore, a broader expansion of safe harbor would help create a level playing field for Australian innovators to offer online services and spur their growth if they are afforded the same protections as foreign counterparts.

By expanding the safe harbour regime to online service providers, Australia would also be aligning with international best practices that have proven that safe harbour regimes covering all online service providers can be implemented fairly and effectively across Asia and other regions. Moreover, consumers will benefit from access to innovative applications and technologies such as online media platforms, cloud-based services, and search engines that will aid them in research or promote their own services, including entities like universities, schools and libraries, as well as having clear processes under the scheme if they wish to challenge the content of a takedown request.

Internet users whose services are provided by organisations covered by the safe harbour scheme are given formal legal rights to issue "counter notices" if they believe that a take down notice erroneously claims that they have infringed copyright. For example, an internet user may have a fair dealing right to use the content in question.

The effect of the Bill will be to expand this counter notice system to a wider range of Australian internet users, such as library patrons, students and people with disabilities, but not to those Australians who use other online services. Failing to expand the safe harbour to all online service providers means that not all Australian internet users will have access to a simple mechanism to challenge a copyright claim or protect their fair dealing rights.

There are several reasons that a broad safe harbour regime (i.e. one that does not exclude online service providers) ultimately benefits Australian companies:

Make Australian businesses more competitive

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. This results in an uneven playing field for local innovators, placing them at a commercial disadvantage when compared to global competitors who are based in jurisdictions with broader safe harbours. For example, a recent study on the economic impact of safe harbours on Internet startups has pointed to a link between effective safe harbours and the success rate of these startups.¹ Not only did the report warn that intermediary startups are likely to be held back in regimes where there is no clearly defined safe harbour, the study found that implementing a safe harbour with clearly defined requirements for compliance, and with low associated compliance costs, could increase startup success rates and expected profits.

¹ "The economic impact of safe harbours on Internet intermediary start-ups" Oxera Consulting, February 2015: <http://www.oxera.com/getmedia/cba1e897-be95-4a04-8ac3-869570df07b1/The-economic-impact-of-safe-harbours-on-Internet-intermediary-start-ups.pdf.aspx?ext=.pdf>

Along with providing regulatory certainty for Internet innovators, such broad safe harbour regimes encourage a simple and systematic way for content creators to take down infringing material without consulting a lawyer - and some online service providers have devised methods to allow content owners to monetise their content. These beneficial innovations for rights holders have occurred due to the existence of safe harbour schemes. This reduces complexity and compliance costs for all, and incentivizes investment into businesses that both create and deliver content online. These benefits would support Australian Internet start-ups, innovators, and content owners who would use such services under a broadened safe harbour regime.

Considered another way, if other countries followed Australia's approach and excluded online service providers from safe harbours, their actions would harm Australian content creators that are present in those foreign markets. Moreover, as noted below, many of Australia's neighbors provide broad coverage for all online service providers, and a concrete signal that some online safe harbors will not receive such protections, will jeopardize digital investment and innovation in Australia.

According to the explanatory notes provided by the committee, the decision to include organisations such as libraries and cultural institutions under the safe harbour regime is that these institutions already comply with the requirements of the scheme, and actively work with copyright owners to take down infringing material residing on their systems or penalise repeat offenders. It is an important fact that all major online service providers do the same: all have processes in place to work copyright owners to take down infringing material. It is difficult to see why private sector players who behave in a similarly responsible manner should be disadvantaged.

Indeed, expanding the safe harbour regimes to cover them and others will further incentivise both public and private sector players to offer new services with strong notice and takedown regimes. Service providers covered by a safe harbour are free to innovate in finding new ways to deal with online piracy, safe in the knowledge that to do so won't expose them to additional legal risks.

Adapt to modern digital economy and benefit consumers

Copyright and intellectual property are the backbone of modern digital economy, and laws should be adapted to meet the needs of new technologies. New applications and technologies today enable consumers to have access to information, including educational and cultural materials, anywhere and anytime. There are applications that make life easier for people with visual impairment by enabling them to read with their ears (audiobooks) and write with their voices.

The Internet has changed the way content is created, distributed, and purchased. For example, Australian content creators - filmmakers, bloggers and musicians - can make a living through

social media and video--sharing sites. A 2012 Australian study by Lateral Economics found that industries which relied on copyright exceptions contributed 14% to GDP and employed 21% of the paid workforce.² The same study indicated that better crafted exceptions and limitations would allow these industries to become even more competitive, a finding echoed by another Australian government review.³

Copyright law affects online platforms because they depend on making and transmitting multiple copies of content in which copyright persists. There are some views that a broad safe harbour laws will only benefit large multinational technology corporations. On the contrary, beneficiaries of free online services, such as search engines or online media platforms are universities, schools and libraries this Bill seeks to support, as well as individual Australian businesses and consumers. Online services allow these beneficiaries to promote their services and share ideas, and much more.

Fulfil trade commitment and benefit from best practices

The Australia -United States Free Trade Agreement (AUSFTA) aims in part to harmonise the two countries' copyright regimes, yet they diverge in their application of safe harbour. Though the treaty prescribes requirements for Australia and the United States to include all online service providers under their safe harbour schemes, Australia's implementation currently only covers "carriage service providers." The proposed amendments of the Bill seek to amend Australia's scheme and extend it to cover other service providers, including organisations assisting persons with a disability, and bodies administering certain educational institutions, libraries, archives and cultural institutions. Extending safe harbour to all online service providers would better match the AUFTA's vision towards a seamless trading environment with one of Australia's largest economic partners. A government-convened review by Australia's Productivity Commission in 2016 also supported a change to broaden Australia's interpretation of safe harbour in line with its international treaty obligations.⁴

It should be noted too that Australia's implementation of safe harbour is still much more restricted than other countries such as Singapore and South Korea. Contrary to belief that broad safe harbour laws will be detrimental to local businesses, it has actually been proven to work effectively in these countries – balancing the interests of all stakeholders. These two countries

² "Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour." Lateral Economics, August 2012:

<http://digital.org.au/sites/digital.org.au/files/documents/Excepting%20Future%20-%20Lateral%20Economics%20Report%20%28Sept%202012%29.pdf>

³ The Australian Law Reform Commission's 2014 "Copyright and the Digital Economy" report provides an extensive review of copyright exceptions in Australia and recommends the introduction of additional exceptions, including the introduction of fair use exception:

https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf

⁴ "Draft report on Intellectual Property Arrangements" Productivity Commission, April 2016, see page 567: <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>

emerged among top-ranked economies in both the International IP Index⁵ and the Global Innovation Index 2017⁶, performing better than Australia.

The application of the law in Singapore and South Korea show how broad safe harbour regimes can encourage companies to implement strong notice and takedown regimes⁷:

- In Singapore, Section 193A of the Copyright Act broadly defines “network service providers” to encompass most Internet intermediaries under the safe harbour laws. But to qualify for the safe harbours, a network service provider has to introduce a policy for termination of repeat infringers, and must accommodate and not interfere with standard technical measures for identification or protection of copyrighted material.
- In South Korea, the Korean Copyright Act of 2003 includes provisions that protect online service providers, defined as persons who “provide others with services that reproduce or interactively transmit works, etc. through information and communication networks.” Korean law reduces or waives liability for these providers in cases where they prevent or stop an allegedly infringing reproduction or transmission when it is so “made aware.”

Conclusion

Thank you for the opportunity to provide comments and we hope that our above comments are useful to you. Please do not hesitate to contact the AIC at jeff@aicasia.org should you wish to discuss the contents of this submission further.

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⁵ U.S. Chamber International IP Index, Fifth Edition, February 2017, Pg 19:
http://www.theglobalipcenter.com/wp-content/uploads/2017/02/GIPC_IP_Index_2017_Report.pdf

⁶ The Global Innovation Index 2017, 10th Edition, Pg xviii:
http://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2017.pdf

⁷ Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries:
http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries.pdf