

## Safe Harbours (Copyright)

### Background

The 'Safe Harbour' scheme provides an incentive for service providers to establish efficient mechanisms for the removal from their platforms of material that infringes copyright. In return, service providers are protected from liability relating to any such infringement.

When introduced in 2005 as part of the implementation of the Australia-US Free Trade Agreement, the scheme was defined as applying only to 'carriage service providers' (ie Internet Service Providers). This very unfortunate and unintended limitation thereby excludes from the scheme all other providers of online services, including:

- schools, libraries and universities, including providers of [MOOCs](#);
- commercial service providers - for example [RedBubble, a Melbourne-based print-on-demand platform](#); and,
- non-profit organisations – including community organisations.

This limitation is out of line with US law and with similar schemes elsewhere, including Singapore, South Korea and Japan.

### Problems

#### Heightened legal risk

Providers that are excluded from the safe harbour scheme face heightened legal risk and consequently carry higher compliance costs. This is a real issue – for example, in 2003 music companies commenced proceedings against Australian universities alleging that their IT systems had been used to infringe copyright.

This heightened risk is also a serious impediment to service innovation, putting Australian start-ups at a competitive disadvantage and providing another reason for them to move offshore.

#### Higher costs of tackling copyright infringement

Because the current safe harbour scheme is so limited, Australian creators are in many cases burdened with much slower and (often prohibitively) expensive processes, involving the Federal Court, to achieve the removal of infringing material.

#### No protection against wrongful claims

Australian consumers using free online services to host their content have no local legal protections against wrongful takedown claims, while companies using commercial ISPs do.

### **Solution: replace ‘carriage’ with ‘online’**

Replacing ‘carriage’ with ‘online’ in the relevant sections of the Copyright Act will extend the safe harbour scheme to all ‘online service providers’.

This solution was proposed in the December 2015 exposure draft of the Copyright Amendment (Disability Access and Other Measures) Bill and is [recommended by the Productivity Commission](#) in their recent Report into Australia’s Intellectual Property arrangements (recommendation 19.1).

### **Benefits**

This simple, but long-overdue, legislative correction will have a number of tangible benefits, including the following:

- universities running online repositories have a process to deal with accidental infringements (eg for uncleared quotes or where rights have been transferred to publishers) by academics uploading materials, avoiding excessive legal risk;
- Australian online platforms that host user generated content can operate onshore, rather than basing their operations in safe harbour countries like the US, Singapore, South Korea and Japan;
- libraries can make user-uploaded collection additions available online to the public;
- Australian technology start-ups will have one less reason to move offshore;
- consumers will have local legal protection from wrongful take-down requests; and,
- Australia will finally achieve real compliance with our obligations under the Australian-US Free Trade Agreement (AUSFTA), which requires all service providers to have access to the safe harbour scheme.

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