



**Computer & Communications
Industry Association**
Tech Advocacy Since 1972

January 30, 2018

Via Electronic Submission

Committee Secretary
Senate Environment and Communications Legislation Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Committee Secretary:

The Computer & Communications Industry Association (CCIA) represents large, medium, and small companies in the high technology products and services sectors, including Internet products and services, electronic commerce, computer hardware and software, and telecommunications.¹ Our members' services and products are used by small businesses, startups, creators, designers, and artists around the world to create content and reach audiences. CCIA welcomes the opportunity to comment on the Copyright Amendments (Service Providers) Bill 2017. While it is encouraging that the Australian government recognizes changes to copyright law are needed, unfortunately the current proposal will significantly disadvantage Internet services who seek to operate in the Australian market and will impede creativity and innovation online.

I. An intermediary liability framework that enables digital trade opens up opportunities for the Australian Internet economy.

Internet-enabled commerce represents a large and increasingly growing sector of the global economy. To illustrate, global e-commerce grew from \$19.3 trillion in 2012 to \$27.7 trillion in 2016 - almost a 44% increase (USD).² Australian small and medium-sized enterprises (SMEs) in particular are well-poised to take advantage of Internet opportunities. The Internet grants SMEs access to services that increase the productivity of SMEs and their ability to compete internationally.³ SMEs that heavily utilize the Internet export twice as much as those who do not and those with high Internet usage increased productivity by 10%.⁴ The strength of the Internet-enabled commerce directly affects trade – estimates link Internet connectivity with increased exports.⁵ Australian businesses rely on U.S. services to reach international markets, illustrated by Australian service imports for telecommunications, computer and information services from the United States. In 2016, these imports amounted to \$1,046 million (AUD).⁶ However, with only a 13.2% growth from 2011-2016⁷ there is clearly an opportunity to expand the market.

¹ A list of CCIA members is available at <https://www.ccianet.org/members>.

² U.S. Int'l Trade Comm'n, *Global Digital Trade 1: Market Opportunities and Key Foreign Trade Restrictions* (Aug. 2017).

³ Joshua P. Meltzer, *Using the Internet to Promote Services Exports by Small- and Medium-Size Enterprises*, Brookings (Feb. 2015).

⁴ McKinsey & Co., *Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity* (2011).

⁵ George R.G. Clarke, *Has the Internet Increased Exports for Firms from Low and Middle Income Countries?* Information Economics & Policy, Vol. 20, Issue 1 (Mar. 2008).

⁶ Australian Government, Dept. of Foreign Affairs and Trade, *Trade in Services Australia* (2016), <http://dfat.gov.au/about-us/publications/Documents/trade-in-services-australia-2016.pdf>.

⁷ *Id.* At 71.

Future growth of Australian exports will depend on the ability to access and export to international markets. Predictability is especially critical when companies seek to invest in new markets. For Internet companies of all sizes, this includes predictable international liability rules that have allowed them to succeed in markets where policymakers have created liability rules that encourage rapid innovation and entrepreneurial spirit online. Research has documented a strong relationship between reliable and robust safe harbours and startup success.⁸

Australian legislators are poised to take steps that will enable innovation with the review of Australian copyright laws. Crafting an appropriate intermediary liability framework can expand Australia's opportunity for digital trade. Unfortunately, the proposed Copyright Amendments (Service Providers) Bill 2017 does not achieve this goal. The proposed bill would expand the intermediary protections to some service providers, including organisations assisting persons with a disability, public libraries, archives, educational institutions and key cultural institutions — a proposal that effectively acknowledges that the scope of the current safe harbour is too narrow.⁹ However, 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.

II. Expanding safe harbour protections is required by Australia's international obligations and will open up opportunities for digital trade.

Amending the Copyright Act to extend safe harbours to all service providers would be consistent with Australia's obligations under the Australia-U.S. Free Trade Agreement (AUSFTA).

Article 17.11.29 of AUSFTA requires the parties to introduce limitations on the liability of providers of Internet services for copyright infringement. The safe harbours in Article 17.11.29 address four separate Internet functions or activities identified. Those distinct activities are: 1) transmission, routing, or providing connections ("mere conduit"); 2) automatic caching; 3) storage ("hosting"); and 4) referring or linking to an online location.

AUSFTA requires that these four safe harbours extend to "service providers." Article 29(b)(xii) provides two different meanings for two different types of "service provider." For the mere conduit functions, "service provider" means "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 the material of the user's choosing." For the functions of caching, storage, and referring or linking users to an online location, "service provider" more generally means "a provider or operator of facilities for online services or network access."

However, the Australian implementation of this safe harbour obligation, codified at sections 116AA et seq. of the Copyright Act 1968, applies only to "carriage service providers" rather than "service providers." Sections 7 and 87 of the Telecommunications Act 1997 define a "carriage service provider" as a provider to the public of a service for carrying communications by means of guided and/or

⁸ Oxera Consulting, *The Economic Impact of Safe Harbours on Internet Intermediary Start-ups* (2015), <http://www.oxera.com/getmedia/cba1e897-be95-4a04-8ac3-869570df07b1/The-economic-impact-of-safe-harbours-on-Internet-intermediary-startups.pdf.aspx?ext=.pdf>.

⁹ Draft Copyright Amendment (Service Providers) Bill 2017, http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s1115_first-senate/toc_pdf/1728220.pdf;fileType=application%2Fpdf.

unguided electromagnetic energy.¹⁰ In essence, the existing scheme provides safe harbours only to part of one of the two categories of service providers required by AUSFTA—providers of mere conduit services to the public. The definition of carriage service provider excludes both 1) providers of conduit services to a limited universe of users (*e.g.*, a college’s students); and 2) providers of facilities for online services that do not also provide conduit services to the public (*e.g.*, a search engine or a web host).

The Australian government has recognized this inconsistency in multiple proceedings¹¹ with some proposals properly expanding the safe harbours to include the necessary functions.¹² Unfortunately, these proposals were tabled. The proposed Copyright Amendments Bill (Service Providers) 2017 will not bring Australian copyright law into compliance with AUSFTA through its narrow extension to certain organisations.

III. Expanding the safe harbours to meet international commitments will not promote piracy.

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.¹³ This is why many companies, artists, designers, and consumers have urged Australia to meet its commitments regarding safe harbour protections.¹⁴

IV. Conclusion

The expansion of safe harbours under Australian copyright law should extend to all service providers, consistent with the obligations under the AUSFTA and international norms. This change will open up opportunities for digital trade in Australia and enable local creators and innovators online.

Respectfully submitted,

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¹⁰ Senator the Honourable Mitch Fifield, Minister for Communications, *Copyright Amendment (Service Providers) Bill 2017 Explanatory Memorandum* 3 (2017). In a response to a 2014 government discussion paper, a submission by five leading Australian law professors stated that “this extremely complex term, interpretation of which takes us on a merry chase through the provisions of the Telecommunications Act of 1997(Cth), in essence limits the safe harbours to phone companies.” Isabella Alexander, Robert Burrell, Michael Handle, Emily Hudson, and Kimberlee Weatherall, *Submission in Response to Online Copyright Infringement Discussion Paper 23* (2014)(quotations omitted)(“Law Professor Submission”). The law professors observed that “this gives rise to a ridiculous situation where actual search engines, and actual web hosts, cannot take advantage of safe harbours designed and intended to protect them from liability.” *Id.* at 23-24.

¹¹ Australian Attorney-General’s Department, Consultation Paper: Revising the Scope of the Copyright Safe Harbour Scheme (2011), <https://www.ag.gov.au/Consultations/Documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme.pdf>; Australian Government Productivity Commission, Intellectual Property Arrangements Recommendations (Sep. 2016), <http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf>.

¹² Copyright Amendment (Disability Access and Other Measures) Bill 2016.

¹³ CCIA, *The Sky is Rising* (2014), <https://www.cciagnet.org/wp-content/uploads/2014/10/Sky-Is-Rising-2014.pdf>.

¹⁴ See <http://expandsafeharbours.today/>.