

31 January 2018

Senator the Hon Jonathan Duniham  
Chair  
Senate Standing Committee on Environment and Communications  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600  
By email: ec.sen@aph.gov.au

Dear Senator

### **Copyright Amendment (Service Providers) Bill 2017**

The Intellectual Property Committee of the Business Law Section of the Law Council of Australia (**IPC**) welcomes the opportunity to provide this submission to the Senate Standing Committee on Environment and Communications regarding the Copyright Amendment (Service Providers) Bill 2017 (**the Bill**).

The IPC welcomes the Government's decision to expand access to the safe harbours, but has concerns regarding the matters addressed below.

#### **Scope of the expansion**

The IPC notes the decision of the Government to make an 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.<sup>1</sup>

The IPC 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).

The IPC notes 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

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<sup>1</sup> Second Reading Speech, Copyright Amendment (Service Providers) Bill 2017, Hansard (Senate) 6 December 2017, 75.

of step with legislation in comparable jurisdictions which provide general safe harbours, including the US,<sup>2</sup> Europe,<sup>3</sup> Canada,<sup>4</sup> and Singapore<sup>5</sup> (among others).

### Questions relating to the drafting of proposed s 116ABA

The IPC submits that the drafting of s 116ABA is unclear. Section 116ABA is a definition – it defines the concept of “service provider” and by doing so, defines the set of entities that may rely on the safe harbours provided in Part V Div 2AA.

Definitions in the Copyright Act are either exclusive (ie, an exhaustive definition of the concept) or inclusive (include certain things in the definition without confining its meaning). Elsewhere in the Copyright Act, where an exclusive definition is intended, the Act provides that “A [concept] ... *means*” followed by the list of things falling within the definition.<sup>6</sup> Other concepts are defined inclusively, by providing that “A [concept] ... *includes*” followed by a list.<sup>7</sup>

By contrast, s 116ABA(1) states that “Each of the following is a *service provider*”. The IPC submits that this language could be read exclusively *or* inclusively. This is not clarified by the Explanatory Memorandum (EM), which uses “include” and “included” but in a way that seems to imply the definition is intended to be exhaustive.<sup>8</sup>

The uncertainty is increased by s 116ABA(2), which starts with the language “If a service provider is *not*... [a carriage service provider, organisation assisting persons with a disability or the body administering an educational institution]”. This language might suggest that s 116ABA(1) is an inclusive definition (in that s 116ABA(2) contemplates service providers not falling within the definition in 116ABA(1)). But not all the institutions in s 116ABA(1) are listed in s 116ABA(2), meaning that s 116ABA *can* have effect as an exclusive definition. It is not clear which reading is correct.

For some (but not all) bodies covered by the new definition, only activities done because of a “relationship” fall within the safe harbour. The concept of “relationship” is unclear. The Explanatory Memorandum gives an example of the Crown, being a body that administers a school, but is covered by the safe harbour only for activities carried out because of the relationship with the school – which, the Explanatory Memorandum asserts, would not cover activities relating to general education policy. But arguably the need to develop education policy arises because of the Crown’s “relationship” with the school (and every other school). So “relationship” is narrower than it could be, but how much narrower is unclear (is it intended to be as narrow as, say, s 200AB?). The effect of s 116ABA(2) also appears to be to create two tiers of institutions: those whose activities are covered generally (those listed in s 116ABA(2)) and those whose activities are covered only in certain circumstances (those not listed, including libraries, archives, and key cultural institutions).

The IPC therefore recommends that the government should clarify which entities it intends to include within the definition of “service providers”, and which activities. If the intention is

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<sup>2</sup> 17 USC §512.

<sup>3</sup> *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* OJ L 178, 17.7.2000, p. 1–16, articles 12-14.

<sup>4</sup> *Copyright Act 1985* (Canada) s 31.1.

<sup>5</sup> *Copyright Act 1987* (Singapore) ss 193B-E; 252A-252C.

<sup>6</sup> See, for example, in s 10 the definitions of “access control technological protection measure”, “accessory”, “adaptation”, “approved label”, “archives” (among many others), or “artistic work”.

<sup>7</sup> See, for example, in s 10 the definition of “literary work” and “dramatic work”.

<sup>8</sup> See here the two different uses of the word “include” and “included” on page 6.

to cover only those service providers listed in s 116ABA(1), the legislation should state that service provider means those entities listed in s 116ABA(1).

### **Will the Bill be effective?**

The IPC also queries whether the Act, if understood to apply only to activities actually conducted by the identified public interest institutions, will achieve the goals identified in the Explanatory Memorandum and Second Reading Speech. According to the Explanatory Memorandum, the legislation is intended to “broaden the people that are able to take advantage of the safe harbour scheme” (Explanatory Memorandum, page 6). According to the Second Reading Speech, the bill is intended to “support [a group of organisations that provide services in the public interest] in being more innovative in the online environment” and “encourage these institutions and organisations to create and deliver enhanced online services for all Australians”.

Many educational institutions, libraries, archives and organisations that assist people with disabilities work with technology providers – Australian 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 non-compliance 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.

I trust these observations are of assistance.

Please contact Wayne Condon, Chair of the IPC at [wayne.condon@lawyer.com](mailto:wayne.condon@lawyer.com) in the first instance, if you require further information or clarification.

Yours sincerely



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