



**Google Australia's submission to the Department of Communications and the Arts  
on the exposure draft of the Copyright Amendment (Disability Access and Other  
Measures) Bill 2016**

**About Google**

Google's mission is to organise the world's information and make it universally accessible and useful. Encouraging the creation of information and creative content is essential and complementary to our business. Through products such as Google Search, Google Play, YouTube, Google Books and Blogger, we've provided music, video and literary copyright owners and innovators with platforms to reach billions of fans and new ways in which to monetise their content.

Take, for example, YouTube. Today, YouTube has more than one billion users globally, almost one-third of all people on the Internet. Every day people watch hundreds of millions of hours of video on YouTube and generate billions of views. And every minute some 400 hours of video is uploaded to the YouTube platform.

Through the YouTube Partner Program, Australian content producers large and small have been able to reach global audiences and monetise their content by sharing advertising revenue. As of late 2014, YouTube has paid over US\$1 billion to content owners who have chosen to monetise their content on YouTube. These content owners include not only major national and international network broadcasters, movie studios and record labels, but also local Australian YouTube stars like Nick Boshier and Connor Van Vuuren (known online as the Bondi Hipsters), Derek Muller (creator of the educational YouTube science channel, Veritasium) and Elise Strachan (creator of the YouTube cooking channel MyCupcakeAddiction).

Unfortunately, because of Australia's existing regulatory regime, the creation of platforms like YouTube, Facebook and Twitter are more likely to occur in countries like the United States, which have a strong safe harbour framework.

Google welcomes the Government's proposed changes to Division 2AA of the *Copyright Act 1968* (Cth) (the **Safe Harbour Scheme**) as contained in the exposure draft of the *Copyright Amendment (Disability Access and Other Measures) Bill 2016* (the **Draft Bill**).

### **Australian startups and online service providers need adequate safe harbours**

Presently Australia's Safe Harbour Scheme only applies to commercial ISPs and not to providers of other online services. This has serious implications for the Australian digital economy. For non commercial ISPs, it makes Australia a high-risk legal environment for hosting content, especially when compared with countries that have strong safe harbour frameworks, such as the US, Singapore, the UK and other EU countries. The types of inconsistencies which result are:

- ISPs such as Telstra and Optus are covered by the Australian safe harbours because they are carriage service providers.
- Global Internet companies are covered by safe harbour schemes operating outside of Australia, as long as their services are hosted from a jurisdiction such as the US or one of the many other countries that have effective safe harbours. However, they would not be covered if they operated from Australia.
- Local Internet companies hosting content in Australia have no safe harbour protection and are thus at a serious commercial disadvantage as compared with their global commercial competitors and commercial ISPs. This operates as a real disincentive for innovation and for the creation of those types of businesses in Australia.

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 Internet startups.<sup>1</sup> The study - conducted by UK firm Oxera Consulting - found that implementing a safe harbour with clearly defined requirements for compliance and with low associated compliance costs could not only increase startup success rates, but also increase the expected profits of successful startups.<sup>2</sup> It found that an effective safe harbour regime is an important policy lever for encouraging more startup activity.

This is not surprising. While all Internet intermediaries are vulnerable in a regulatory environment where legal risk and compliance costs are high, startups by their nature are particularly vulnerable. The authors of the Oxera report warned that intermediary startups are likely to be held back in regimes where there is no clearly defined safe harbour.<sup>3</sup>

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<sup>1</sup> 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>>

<sup>2</sup> Ibid at 2. Note: the study concerned startups in Chile, Germany, India and Thailand.

<sup>3</sup> Ibid at 3.

Similarly, a 2016 study by advisory and investment firm Fifth Era, found that 69% of surveyed investors in Australia were “uncomfortable investing in internet businesses where the intermediaries could be held liable for third party content or actions”.<sup>4</sup>

Australian copyright is a key lever through which to promote innovation and commercialisation. However, Australia’s lack of a strong Safe Harbour Scheme means that Australian companies operating online carry greater legal risk than their counterparts in other countries. In turn, this inevitably impacts on the investment funds they can attract.

## **The Draft Bill**

The Draft Bill, if implemented, would rectify the serious limitations of Australia’s Safe Harbour Scheme. Accordingly, Google agrees with the Government’s proposal to replace the term ‘carriage service provider’ with the term ‘service provider’. Google also agrees with the inclusion of the proposed definition of ‘service provider’ set out in the Draft Bill. As noted in the consultation paper, the proposed definition of service provider is consistent with the equivalent definition in Article 17.11.29(xi) of the Australia United States Free Trade Agreement (**AUSFTA**) and Article 18.81 of the Trans Pacific Partnership Free Trade Agreement.<sup>5</sup> The corollary of this is that Australia is presently non-compliant with its obligations under the AUSFTA. This is a view previously expressed by international copyright experts Professors Jane Ginsburg and Sam Ricketson.<sup>6</sup>

Together, those changes will achieve the Government’s stated aim of expanding the range of entities to which the current ‘safe harbour’ provisions apply, to include “educational institutions and other online services (such as online search engines, bulletin boards and cloud storage services)”.<sup>7</sup>

For the reasons set out in Google’s recent submission to the Productivity Commission’s review into Australia’s IP arrangements,<sup>8</sup> Google submits the draft amendments, if enacted, will encourage greater innovative activity online by Australian businesses. In particular, if implemented the draft amendments will reduce Australia’s status as a high-risk legal environment for hosting content.

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<sup>4</sup> Fifth Era, *The impact of internet regulation on local and foreign investment* (2016) at 34  
<<http://www.fifthera.com/perspectives-blog/2016/1/7/report-the-impact-of-internet-regulations-on-investment>>

<sup>5</sup> Department of Communications and the Arts, (‘Stakeholder consultation: proposed reform of the *Copyright Act 1968*’, December 2015) 6.

<sup>6</sup> Jane Ginsburg and Sam Ricketson, “Separating Sony Sheep from Grokster (and Kazaa) Goats : Reckoning Future Business Plans of Copyright dependent Technology Entrepreneurs” (2008) 19 *Australian Intellectual Property Journal* 10, 31.

<sup>7</sup> Department of Communications and the Arts, (‘Stakeholder consultation: proposed reform of the *Copyright Act 1968*’, December 2015) 6.

<sup>8</sup> Google Australia, Submission No 102 to Productivity Commission, *Intellectual Property Arrangements*, 15 December 2015

<[http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0011/194861/sub102-intellectual-property.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0011/194861/sub102-intellectual-property.pdf)>

Importantly, the draft amendments will also benefit rights holders by creating a simple system that will provide them with an efficient way to seek the removal of infringing content online and reward online service providers for their collaboration by granting them certain legal protections. It will also operate to protect the legitimate interests of consumers by providing a process through which they can challenge incorrect claims of copyright infringement. As such, the draft amendments would operate to provide not only legal certainty but also to minimise compliance costs for all participants.

## **Conclusion**

Australian Internet regulation in general, and copyright laws in particular, must develop in line with international best practice in order to be conducive to innovation, the creation of new online businesses<sup>9</sup> and economic growth. Expanding the Safe Harbour Scheme is central to achieving those goals and is entirely consistent with the Turnbull Government's agenda.

This reform is long overdue<sup>10</sup> and is critical to Australia's digital future.

Google commends the Turnbull Government on these proposed reforms.

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<sup>9</sup> The Board of StartupAus recently referred to this proposed reform as "of great benefit to Australia's startup community" in an open letter to the then Minister for Communications, Malcolm Turnbull MP. See Letter from The Board of StartupAus to the Hon. Malcolm Turnbull MP, 21 August 2015

<<https://startupaus.org/wp-content/uploads/2015/08/StartupAUS-letter-re-copyright-safe-harbours.pdf>>

<sup>10</sup> The need to rectify this issue has been identified in several Government reviews since 2005. Most recently in 2015 by the Attorney-General's Department in their discussion paper 'Online Copyright Infringement'. Note: Australia's more limited safe harbour scheme is widely understood to have been the result of a drafting error in the implementation by Australia of its obligations under the AUSFTA.