Exposure Draft—Copyright Amendment (Service Providers) Regulations 2018

June 2018

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Consultation process

This consultation process is seeking views from stakeholders on the exposure draft of the Copyright Amendment (Service Providers) Regulations 2018 (Exposure Draft). The purpose of the Exposure Draft is to ensure Part 6 of the Copyright Regulations 2017 (Regulations) applies to new service providers as defined in the Copyright Amendment (Service Providers) Bill 2017 (Bill).

This consultation paper sets out some specific matters in relation to which stakeholder views are sought. However submissions are welcomed on any aspect of the Exposure Draft, and more generally, on whether the Exposure Draft is fit for purpose.

How to make a submission

Please send questions about the submission process to: copyright@communications.gov.au.

The Department invites submissions by **5.00 pm AEST on 29 June 2018**. Submissions may be lodged in the following ways:

Website	www.communications.gov.au/have-your-say
Email	copyright@communications.gov.au
Post	The Director, Copyright Law Section Department of Communications and the Arts GPO Box 2154 Canberra ACT 2601

Submissions should include your name, organisation (if relevant) and contact details. Submissions without verifiable contact details may not be considered.

Submissions will be treated as non-confidential information, and can be made publicly available on the Department's website, unless a respondent specifically requests its submission, or a part of its submission to be kept confidential, and provides acceptable reasons for this. An email disclaimer asserting confidentiality is not sufficient.

The Department reserves the right not to publish a submission, or any part of a submission, at its absolute discretion. The Department will not enter into any correspondence with respondents in relation to any decisions not to publish a submission in whole or in part.

The Department is subject to the *Freedom of Information Act 1982* and may be required to disclose submissions in response to requests made under that Act.

The *Privacy Act 1988* establishes certain principles regarding the collection, use and disclosure of information about individuals. Any personal information respondents provide to the Department through submissions will be used for purposes related to considering issues raised in this paper, in accordance with the Privacy Act. If the Department makes a submission, or part of a submission, publicly available the name of the respondent will be included. Respondents should clearly indicate in their submissions if they do not wish their name to be included in any publication relating to the consultation that the Department may publish.

Background

On 6 December 2017 the Government introduced to Parliament the Bill which would extend the 'safe harbour scheme' in Division 2AA of Part V of the *Copyright Act 1968* (the Act) to service providers operating in the disability, educational and cultural sectors.

The safe harbour scheme currently only applies to carriage service providers (CSPs) as defined under *Telecommunications Act 1997* (Tel Act). The scheme limits remedies that are available against CSPs for infringements of copyright that occur in the course of CSPs carrying out certain online activities.[1] There are four categories of online activities:

- **Category A Activity** where the CSP acts as a conduit for internet activities through the provision of facilities or services for transmitting, routing or providing connections for copyright material or through the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections;
- **Category B Activity** where the CSP caches copyright material through an automatic process;
- **Category C Activity** where the CSP stores copyright material on their systems or networks at the direction of a user; and
- **Category D Activity** where the CSP refers users to an online location using online information location tools or technology.

A CSP must satisfy the relevant conditions, specified in the Act, to take advantage of the scheme.[2] The Bill will extend this scheme to institutions and organisations in the disability, education, library, archives and cultural sectors.

As the Bill simply aims to extend the application of the current safe harbour scheme to the newly defined institutions and organisations, no amendments are made to the activities or conditions of the safe harbour scheme. The Bill defines the new service providers to which the scheme will apply to by making textually minor amendments to remove the reference to 'carriage' and inserting a definition of 'service provider 'in Division 2AA, Part V of the Act. The scheme is being extended to institutions and organisations which are:

- educational institutions including schools, universities, TAFEs and private training colleges;
- libraries that make their collection available to the public and Parliamentary libraries;
- the National Archives of Australia and specified state archives, galleries and museums;
- other libraries and archives which have a statutory function under a Commonwealth, State or Territory law to develop and maintain collections; and
- organisations assisting people with a disability.

More information about the Bill can be found on the Parliament of Australia website[3].

In the second reading speech of the Bill, the Minister for Communications committed to releasing an exposure draft of amendments to the Regulations to apply the relevant requirements in the Regulations to newly defined service providers.

[1] Part V, Division 2AA, Subdivision B.
[2] Part V, Division 2AA, Subdivision D.
[3] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1115

Application of the Regulations

Prescribed procedures for safe harbour conditions

Subsection 116AH(1) of the Act sets out the conditions which must be complied with for each category of online activity in order to qualify for the limitations on remedies in the safe harbour scheme. A newly defined service provider will need to satisfy the relevant conditions to take advantage of the scheme.

A number of conditions outline procedural matters which may be prescribed by regulation. Table 1 outlines the conditions and how these are prescribed in Part 6 of the Regulations.

Table 1: Conditions outlined in subsection 116AH(1) of the Act and Pt 6 of the Regulations

Condition	Act	Regulation	Effect
For all activities a provider must accommodate and not interfere with **standard technical measures** used to protect and identify copyright material in accordance with a **relevant industry code** (as defined in section 116AB), if such an industry code is in force. If such an industry code is not in force, this condition does not apply.	Item 1, cond. 2	Section 18	Sets out additional requirements for developing **relevant industry codes** as defined under subparagraph 116AB(a)(i) of the Act.
For category B activities a provider must comply with the provisions of a **relevant industry code** (as defined in section 116AB) which relate to updating **cached** copyright material and **not interfering with technology** used at the originating site to obtain information about the use of the copyright material, if such an industry code is in force. If such an industry code is not in force, this condition does not apply.	Item 3, cond. 2	None	No additional requirements are prescribed.
For category B activities a provider must expeditiously remove or disable access to cached copyright material on **notice** that the material has been removed from the original site.	Item 3, cond. 3	Section 21	Prescribes **form of notice** which is set out in *Sch. 2, Pt 1* of the Regulations.
For category C and D activities a provider must expeditiously remove or disable access to either infringing material or references to infringing material upon receipt of a **notice** which outlines a **court finding** about copyright infringement.	Items 4&5, cond. 2	Section 22	Prescribes **form of notice** which is set out in *Sch. 2, Pt 2* of the Regulations.
For category C activities a provider must **comply with procedures** for removing or disabling access to copyright material. *Section 23 of the Regulations outlines the owner or exclusive licensee must reasonably believe the material is infringing.*	Item 4, cond. 3	Sections 24-28	Sets out specific procedures for **notice** from owner (*Sch. 2, Pt 3*), **takedown procedure**, **counter-notice** (*Sch. 2, Pt 4*) and restoration.

Condition	Act	Regulation	Effect
For category C activities a provider must expeditiously remove or disable access to copyright material where **they have knowledge** of infringing material on their system (i.e. no notice from owner or exclusive licensee).	Item 4, cond. 2A	Sections 29-32	Sets out specific procedures for **notice** to user, **counter-notice** (*Sch. 2, Pt 5*) and restoration.
For category D activities a provider must **comply with procedures** for removing or disabling access to copyright material. *Sections 33 of the Regulations outlines the owner or exclusive licensee must reasonably believe the material is infringing.*	Item 5, cond. 3	Sections 33-35	Sets out specific procedures for **notice** from owner (*Sch. 2, Pt 6*) and **takedown procedure**.

Section 19 of the Regulations sets out that a provider must designate a person to be a representative to receive notifications given under the conditions which set out a relevant 'notice and takedown procedure'.[4] This includes requirements for the appropriate contact details of the representative to be put in a reasonably prominent location on its website. Section 20 of the Regulations makes clear that any notification, notice or counter-notice can be provided by post or electronic communication to the designated representative.

Civil Remedies and penalties

In line with section 116AJ of the Act, Division 7 of Part 6 of the Regulations sets out matters concerning civil remedies for actions taken under the safe harbour conditions in subsection 116AH(1) of the Act. Broadly this includes:

- that providers will receive immunity for damages or any other civil remedy as a result of action taken in good faith by the provider to comply with certain conditions (section 37 of the Regulations);
- that providers may be liable for damages or any other civil remedy in an action taken by a user or third party affected by the failure to restore material in line with 28 or 32 of the Regulations (section 38 of the Regulations); and
- outlining that a civil action for loss or damages may be brought against a person who knowingly makes a material misrepresentation in a notification, notice or counter-notice including if they do not take reasonable steps to ensure accuracy of the information in such notices (section 39 of the Regulations).

Exposure Draft Regulations

Application of Regulations to 'service providers'

In line with the intention of the Bill, the Exposure Draft does not affect the current activities and conditions to be met to reduce liability for copyright infringement. Service providers who undertake these activities and comply with the conditions will receive safe harbour protection. Amendments in the Exposure Draft are only required to ensure that the prescribed procedures and forms can apply to the

[4] See Item 3 (category B): condition 3; Items 4 and 5 (category C and D): conditions 2, 2A and 3.

newly defined 'service providers'. The Department is therefore not seeking views on whether substantial policy changes should be made to Part 6 of the Regulations.

As a result, only two types of amendments are proposed to be made to the Regulations. The first is to remove all references to 'carriage' so that the prescribed requirements in the Regulations which implement the conditions in subsection 116AH(1) of the Act will apply to the newly defined 'service providers'. The other change is to introduce a procedure for making an industry code for newly defined service providers.

The Department's review of the Regulations indicates that defined 'service providers' will be capable of complying with the prescribed requirements and forms outlined in Part 6. For example educational, cultural and disability organisations and institutions will be capable of complying with notification, notice and counter-notice procedures which set out clear procedures and timeframes for undertaking these requirements.

Amendments in items 1, 2, 3, 4, and 9-16 of the Exposure Draft therefore make amendments to remove 'carriage' from the Regulations so that the existing conditions will apply to newly defined service providers.

It is proposed that the amendments in the Exposure Draft would commence at the same time as the Bill commences which will be six month after royal assent of its passage.

Designated representatives

Section 19 of the Regulations would require each service provider to designate a person to be its representative to send and receive the required notices. The definition of 'service provider' in the Bill outlines that the bodies administering a library, archives, key cultural institution or education institution will be the relevant legal entity for the purpose of complying with the safe harbour conditions and receiving a limitation on liability.

For example, the body administering a public school is generally the Crown in right of the relevant State or Territory (through the relevant Department of that State or Territory). It will therefore be necessary for the administering body such as the relevant Department of Education to nominate a relevant designated representative. In this example the designated representative would be a person within the relevant Department of Education for that State or Territory, rather than a representative of each school. However there will also be circumstances when it might be appropriate for entities operating under the administering body to separately list designated representatives especially where it is not clear who the administering body is.

Question 1: Are any additional amendments needed to the Regulations to facilitate service providers' compliance with the requirements in Division 2AA, Part V of the Act?

Question 2: We seek views on the practical application of section 19 to service providers and whether additional clarification is needed for when a service provider administers a number of entities.

Industry codes

As outlined above, condition 2 of items 1 (all activities) and 3 (Category B—caching) both require compliance with relevant provisions of an industry code, if one exists. Condition 2 of items 1 and 3 must be complied with *if* a relevant industry code is in force but only where the code deals specifically with standard technical measures (STMs) (these relate to technical measures adopted by copyright owners to restrict use of digital materials i.e. copy protection) or caching.

Section 116AB of the Act provides that, for the purposes of Division 2AA, Part V, an industry code is:

(a) an industry code that:
  (i) meets any prescribed requirements, and
  (ii) is registered under Part 6 of the Tel Act; or
(b) an industry code developed in accordance with the regulations.

The Regulations do not currently stipulate a procedure that must be followed to develop an industry code for the purposes of paragraph (b). Any provisions developed in line with condition 2 of items 1 (all activities) and 3 (Category B—caching) would therefore only be applicable where an industry code is developed under paragraph (a).

Paragraph (a)—registered under the Tel Act

To fall under paragraph (a) of the definition of industry code, in addition to complying with any prescribed requirements, an industry code must also be made in accordance with Part 6 of the Tel Act.

The simplified outline of Part 6 of the Tel Act notes that bodies and associations that represent sections of the telecommunications industry, the telemarketing industry or the fax marketing industry may develop industry codes under the part.

It is unlikely that bodies or associations representing service providers as defined in the Bill will fall within the meaning of sections of the telecommunications industry, the telemarketing industry or the fax marketing industry. Therefore newly defined service providers will be unable to make a code in relation to STMs or caching which could be registered under the Tel Act.

Paragraph (b)—developed in accordance with regulations

Amendments in items 2 and 8 of the Exposure Draft therefore prescribe the requirements for industry codes developed by service providers for the purposes of complying with condition 2 of items 1 (STMs) and 3 (caching) of subsection 116AH(1) of the Act.

The new code requirements are not intended to apply unnecessarily higher or different requirements or standards than those that currently apply to CSPs who would develop and register a STM or caching code under paragraph (a). The new requirements are intended to only apply to service providers who are not CSPs. A new definition of 'designated service providers' is inserted at item 4 of the Exposure Draft to reflect this distinction.

CSPs would be expected to continue to rely on a code making process under paragraph 116ABA(a) of the Act. Items 5 to 7 of the Exposure Draft also propose amendments to paragraph 116ABA(a) to better align the requirements with the new code making requirements (see explanation below).

Industry codes developed by designated service providers (under paragraph (b))

The new code making requirements are intended to reflect the current requirements prescribed under section 18 of the Regulations along with the process for developing codes under section 117 of the Telco Act. The intention is that any code which outlines requirements for STMs and caching will be developed through an open voluntary process between the service providers to which the code will apply and the relevant copyright owners and exclusive licensees.

The new section 18A outlines the following requirements which will need to be fulfilled in order to have a valid industry code, or a variation of such a code:

a) the development of the industry code through an open voluntary process (subsection 2);
b) the code must contain specific provisions in relation to STMs or caching or both (subsection 3);

c) the code must clearly outline which service providers it will apply to (subparagraph 4(a));
d) appropriate public consultation will occur by a relevant person or body representing the designated service providers (subsection 5);
e) the code must contain a provision about when it will take effect and cease to have effect (subparagraph 4(b)); and
f) the code, or variation will be published on the website of a relevant person or body representing the designated service providers (subparagraph 4(c) and (d)).

Given the broad range of service providers that will likely rely on the safe harbour protections, the Exposure Draft is aimed at providing the flexibility for a code to be developed which could apply to specific classes of designated service providers. It is also anticipated that a specific service provider or body representing the service provider would lead the development of the industry code on behalf of the service providers to which the code will apply and undertake appropriate consultation. For instance a sector group such as Universities Australia might lead the development and implementation of a code for the university sector.

The key difference between a paragraph (a) and (b) industry code will be that a designated service provider industry code will not be assessed or registered by a regulatory body. It is intended that it will be a question of fact for a Court to determine whether an industry code is in force based on the conditions in section 18A of the Exposure Draft.

Question 3: Are any additional requirements necessary for the development of an industry code by the newly defined 'designated service providers'?

Question 4: Does the proposed designated service provider code scheme provide sufficient flexibility for designated service providers to work with copyright owners to develop a workable code?

Minor changes to industry codes developed under paragraph (a) (registered under the Tel Act)

A key requirement of both section 18 of the Regulations and 18A of the Exposure Draft is that codes must be developed though a voluntary consensus of carriage service providers/ designated service providers and copyright owners and exclusive licensees. Given the consensus requirements and the potentially broad range of copyright owners, an amendment is proposed to section 18 (and will consequently apply in section 18A) that broad consensus may occur with a specific group of copyright owners or exclusive licensees. This could include specific groups of copyright owners by type of copyright material e.g. music, film, etc.

The other amendment is to extend the broad voluntary consensus requirements in section 18 (which will also consequently apply in section 18A) to codes involving requirements for both STMs *AND* caching. In reviewing the application of voluntary consensus requirements, there appears to be no reason why codes that relate to caching should not also be developed as an open process between copyright owners and carriage service providers. Therefore, it is proposed that the requirement applies equally to codes developed in relation to both STMs and caching.

Question 5: Will the proposed amendments to section 18 of the Regulations (and consequently section 18A) have any unintended effects?