



20 December 2013

The Hon Malcolm Turnbull MP  
Minister for Communications  
Member for Wentworth  
Parliament House  
**Canberra ACT 2600**  
**Email:** deregulation@communications.gov.au

Dear Minister,

**Deregulation: Initiatives in the Communications Sector**

Thank you for your recent letter regarding deregulation initiatives in the Communications Sector. eBay is pleased to provide this response.

eBay commends the Government's commitment to reducing the regulatory burden for business and the community.

eBay believes that regulation in the following areas is excessive or unnecessary and, accordingly, submits the following proposals for deregulation:

1. **The exposure to liability of online intermediaries:** eBay recommends that liability exposure of online intermediaries be deregulated by expanding the "safe harbours" Schedule 5 of the *Broadcasting Services Act 1992* (Cth) and Division 2AA of the *Copyright Act 1968* (Cth);
2. **Territory based restrictions on trade in legitimate products.** The Commonwealth should deregulate the sale of products from overseas by:
  - a. recognising the content classifications applied to CDs, DVDs, streamed, and other forms of media according to the laws of foreign countries;
  - b. removing all intellectual property based barriers to trade in products created with the authority of the brand owner; and
3. **Deregulate the application of the *Copyright Act 1968* (Cth)** between technologies by adopting a technologically neutral approach.

eBay appreciates that copyright legislation and intellectual property protections are not strictly within the purview of the Communications portfolio. However, these laws are directly relevant to the industries that are within the portfolio's remit.

We set out following our proposals for deregulation in more detail using the format you have requested.

**Proposal 1(a): liability of online intermediaries**

<b>Description of relevant regulation</b>	Section 91(1) of Schedule 5 of the <i>Broadcasting Services Act 1992</i> (Cth) provides immunity for "internet service providers" and "internet content hosts" to certain state and territory laws.
<b>Policy underlying regulation</b>	The regulation effectively legislates the common law defence of innocent dissemination, protecting internet services providers and content hosts in instances where they are not aware of the nature of the online content to which they are hosting.
<b>Reasons regulation is no longer needed / could be amended</b>	<p>The law in its current form protects online providers for innocent dissemination at the infrastructure level (eg: ISPs and hosting service providers) but does not protect online platform intermediaries, such as online marketplaces and social media sites.</p> <p>The words "internet service providers" and "internet content hosts" are out of date and do not encompass the actual providers of online services in the digital economy in the present day. As a result, the deregulatory impact of the section is too narrow.</p> <p>The services made available by platform intermediaries are increasingly significant because of the growth of social media and cloud computing. Platform intermediaries face the same challenges as internet service providers, in that they are typically not able to monitor nor are expected to monitor content from third parties on their platforms .</p> <p>eBay submits that:</p> <ul style="list-style-type: none"> <li>• There is no basis for distinguishing between online intermediaries on the one hand and content hosts/internet service providers on the other.</li> <li>• Platform intermediaries should have the protection of the section because it is not feasible for platform intermediaries to verify the ownership of all content posted or managed by internet service providers or</li> </ul>

	content hosts on behalf of their customers.
<b>Proposal to remove or amend</b>	eBay proposes that the words "internet service providers" and "internet content hosts" be replaced with the new overarching term "service provider." , which will expressly encompass platform intermediaries.
<b>What impact removal/amendment will have on industry</b>	<p>The amendment will make it clear that platform intermediaries receive the benefit of the immunity provided for in section 91 of the Act.</p> <p>The deregulation will reduce costs for platform intermediaries as it will be clear that the risk associated with infringing content lies with the author of content. .</p>
<b>What impact removal/amendment will have on consumers/ individuals</b>	<p>Consumers will only be able to take action against online intermediaries if:</p> <p>(a) the intermediary authored the content on its platform; or</p> <p>(b) the platform intermediary was on notice of illegal conduct and failed to adequately respond once it was put on notice.</p>

#### Proposal 1A: liability of online intermediaries

<b>Description of relevant regulation</b>	Part V Division 2AA of the <i>Copyright Act 1968</i> (Cth) creates a limited safe harbour subject to certain conditions for specified activities by Carriage Service Providers.
<b>Policy underlying regulation</b>	According to the Copyright Act, the purpose of the Division is to limit the remedies that are available against carrier service providers for infringements of copyright that relate to the carrying out of certain online activities by carriage service providers.
<b>Reasons regulation is no longer needed / could be amended</b>	Each of the activities described represents a non-consumptive use of copyright material carried out in the ordinary course by carriage service providers and online service providers with no material detriment to the copyright owner. The "safe harbour framework" is complex, unnecessary and irrelevant in practice. The relevant conduct should be deregulated by



	applying a simple, clearly stated immunity for the activities described when carried out by carriage service providers and online service providers.
<b>Proposal to remove or amend</b>	Replace Part V Division 2AA with a simple exception to copyright infringement for carriage service providers and online service providers that applies to each of the "Activities" identified in that Division.
<b>What impact removal/amendment will have on industry</b>	The amendment will free carriage service providers and online service providers from infringing copyright in the ordinary conduct of day to day business.
<b>What impact removal/amendment will have on consumers/ individuals</b>	No detrimental impact to consumers. There will be no practical difference to copyright owners or consumers.

**Proposal 2 (a): Territory based restrictions on trade in legitimate products.**

<b>Description of relevant regulation</b>	The <i>Classification (Publications, Films And Computer Games) Act 1995</i> (Cth) and the National Classification Code require all content provided in Australia to be classified by the Classification Board or an Australian trained classifier using Australian classification symbols. Overseas classifications are not currently recognised in Australia.
<b>Policy underlying regulation</b>	To some extent the value of the content classification scheme depends on Australians recognising and understanding a classification marking.
<b>Reasons regulation is no longer needed / could be amended</b>	<p>The current position is overly restrictive, as it does not recognise the level access that Australian's have to overseas content nor the convergence of national classification schemes.</p> <p>It is also problematic and costly for global platforms to modify classification markings to cater for multiple jurisdictions. Moreover, the regulation arguably places local content providers at a competitive disadvantage to overseas competitors that are not subject to the same burden.<sup>1</sup></p>

<sup>1</sup> See [Google's submission to the Australian Law Reform Commission regarding the National Classification Scheme Review Discussion Paper \(2011\)](#).

<b>Proposal to remove or amend</b>	<p>The Australian classification regime should be amended to recognise overseas classifications of content. As the ALRC said in its 2011 report, "some global platforms, particularly those of new or emerging content providers, may not be able to tailor classification markings to the countries from which users access the content. Those who cannot provide such information could perhaps also be taken to comply with their markings obligations if their website or platform directs users to where Australian classification information can be found. In any event, because many Australians access content provided with international classification markings, the Regulator could provide information about the meaning of common international classification markings to assist Australian audiences."<sup>2</sup></p> <p>eBay proposes that the Australian classification regime recognise overseas classifications "by, perhaps, requiring that the overseas classification be displayed with the content, with a notice clearly indicating the country where the classification was made. Consumers might then also be provided with a link to information regarding the meaning of the foreign classification or an industry approved interpretation of the foreign classification in terms of local standards."<sup>3</sup></p>
<b>What impact removal/amendment will have on industry</b>	<p>eBay submits that this amendment will significantly deregulate the trade in internationally sourced multimedia material and "enhance the ability of online providers to source and make available a wider range of content".<sup>4</sup> The deregulation will also reduce compliance costs for content providers.</p>
<b>What impact removal/amendment will have on consumers / individuals</b>	<p>Consumers will have access to a wider range of content.</p>

<sup>2</sup> [Australian Law Reform Commission Report: Classification—Content Regulation and Convergent Media \(2012\)](#) at 8.25.

<sup>3</sup> *Ibid*, at 8.20.

<sup>4</sup> [Internet Industry Association submission to the Australian Law Reform Commission in relation to the National Classification Scheme Review \(2011\)](#).

**Proposal 2 (b):**

<b>Description of relevant regulation</b>	<p>Sections 44C to 44F of the <i>Copyright Act 1968</i> (Cth) provide a framework for the importation of goods into Australia in the following circumstances:</p> <ul style="list-style-type: none"> <li>a) where the copyright work is, is on, or embodied in a non-infringing accessory to an article (s 44C);</li> <li>b) where the non-infringing copy is of a sound recording (s 44D);</li> <li>c) where the copyright work is a computer program (s 44E); or</li> <li>d) where the copyright work is, or is part of, an electronic literary or music item (s 44F).</li> </ul> <p>Section 123 of the <i>Trade Marks Act 1995</i> (Cth) prohibits the importation of 'grey goods' unless the relevant trade mark was applied to the goods in question with the consent of the registered trade mark owner.</p>
<b>Policy underlying regulation</b>	These regulations seek to prevent parallel importation to protect the interests of intellectual property owners.
<b>Reasons regulation is no longer needed / could be amended</b>	<p>The existing legislative framework is unnecessarily complex, inconsistent and an inappropriate impediment to free trade in legitimate goods.</p> <p>In a global digital economy, it is not feasible to adopt restrictions which do not make sense or cannot be enforced. eBay submits that a person should not be prevented from selling into Australia any item that has been lawfully manufactured outside Australia. By selling goods which do not fall into the identified exceptions, eBay's users risk breaching the relevant acts even when there has been no consequential effect on the copyright or trade mark owners.</p>
<b>Proposal to remove or amend</b>	eBay proposes that the relevant acts be amended to permit the importation and sale of any goods created with the authority of the intellectual property owner.



<b>What impact removal/amendment will have on industry</b>	These amendments are likely to remove the risk associated with online sales and enable more effective, and legally certain, commercial transactions.
<b>What impact removal/amendment will have on consumers / individuals</b>	eBay notes the Australian Competition and Consumer Commission has indicated its support for parallel importation as a competitive measure which is beneficial to Australian customers, due to reduced pricing and the greater availability of products. <sup>5</sup>

### Proposal 3:

<b>Description of relevant regulation</b>	The <i>Copyright Act 1968</i> (Cth) ( <b><i>the Act</i></b> ), should not impose regulatory restrictions on the providers of cloud services that do not apply to the use of owned devices or the use of leased in home equipment.
<b>Policy underlying regulation</b>	The Act seeks to incentivise the creation of original works.
<b>Reasons regulation is no longer needed / could be amended</b>	<p>Attachment 2 of the Deregulation in the Communications Portfolio Framing Paper states that regulation "should be as technologically neutral as possible, to avoid creating regulatory distinctions between similar services that are delivered differently". eBay endorses this approach.</p> <p>eBay submits that "Australia's very technology-specific exceptions inhibit the cloud computing model for individuals and create elevated risks for both consumers and internet intermediaries".<sup>6</sup></p> <p>eBay supports the recommendation in the Government's 2012 Convergence Review that the Act should be amended to adopt a technology-neutral approach that can adapt to new services, platforms and technologies.<sup>7</sup> Moreover, eBay endorses the ALRC's recommendation that "as far as possible, the Copyright Act should be technology neutral and predictable in application in such a way as to minimise</p>

<sup>5</sup>See <http://www.accc.gov.au/content/item.php?itemId=179183&nodeId=5466d384ea376830f3007417eef6cb72&fn=PARALLEL%20IMPORTING.pdf>

<sup>6</sup> K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance, 22.

<sup>7</sup> Recommendation 1 of the Australian Government's *Convergence Review* (2012).

	and avoid unnecessary obstacles to an efficient market, and avoid transaction costs". <sup>8</sup>
<b>Proposal to remove or amend</b>	eBay proposes that a provision be inserted into the Act which deregulates the application of the legislation between technologies so that any right of use or defence expressed in the Act may be enjoyed by a user by any technological means including by deployment of a third party service, such as a cloud service.
<b>What impact removal/amendment will have on industry</b>	Cloud service providers will no longer risk being found liable of copyright infringement for allowing consumers to exercise any fair dealing rights under a cloud service. This will facilitate the growth and expansion of online services useful to consumers. For example, programme time shifting, online back up, communication for the purpose of criticism and review and reporting of news could be carried out using third party services without the service provider risking liability.
<b>What impact removal/amendment will have on consumers / individuals</b>	No detrimental impact to consumers. In fact this amendment would be highly advantageous to consumers and to the online economy in Australia.

Should you or your office require further information please do not hesitate to contact me on [sgrigorian@ebay.com](mailto:sgrigorian@ebay.com)

Yours sincerely



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<sup>8</sup> [Australian Law Reform Commission Discussion Paper: Copyright and the Digital Economy \(2013\)](#), Principle 4.