
Response to
Attorney-General's Department
Part V Division 2AA of the Copyright Act 1968 (Cth)
Limitation on Remedies Available against Carriage Service Providers
Does the Scheme need to be Expanded?

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I am a lecturer in law at the University of Melbourne, a specialist in intellectual property law and the Associate Director (Law) of the Intellectual Property Research Institute of Australia (IPRIA). I have written and published on intellectual property generally, and on digital copyright issues in particular, in both European and United States journals, and am currently directing a number of research projects relating to intellectual property. I also have my own weblog (blog), *Weatherall's Law* (<http://weatherall.blogspot.com>). I make this submission in my personal capacity; the views expressed here should not be taken to represent the views of the Intellectual Property Research Institute of Australia nor the University of Melbourne. I am more than happy to answer any questions that arise from this response. I can be contacted as follows:

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The Attorney-General's Department has asked for responses to the issue of whether the Safe Harbours provided by Part V Div 2AA, introduced as a result of the Australia-United States Free Trade Agreement, should be extended beyond 'Carriage Service Providers' ('CSPs') as defined under the *Telecommunications Act 1997*.

The comments I wish to make in response to the *Issues Paper* can be briefly stated, and fall under three headings.

1 Using definitions from the *Telecommunications Act 1997* is not a sensible approach to defining the group of entities and people who can take advantage of the Safe Harbours

It makes no sense to use definitions from the *Telecommunications Act 1997* in fixing the parties to whom the Safe Harbours will be available, for three basic reasons:

- The definitions in the *Telecommunications Act 1997* (Cth) are inordinately complex, even for telecommunications lawyers. The terms involved are highly technical terms of art, determining the meaning of which requires the reading and piecing together of many sections of the *Telecommunications Act 1997* (Cth).¹ Their use renders the system highly complex, reduces the clarity of the Safe Harbours (clarity being one of the objectives of the system), and makes the law on this point inaccessible to anyone but the most specialised IP/IT lawyers;
- The definitions in the *Telecommunications Act* have been drafted for the purposes of determining the applicability of general telecommunications regulation as found in the *Telecommunications Act 1997*. They were not drafted with the control of copyright infringement in mind. It is preferable to consider the policies and purposes of copyright law in determining who should have access to the Safe Harbours;
- The functions to which the Safe Harbours are directed are not performed only by CSPs. This is confirmed by the recent *Cooper* litigation, in which obiter comments by Tamberlin J suggest that an ISP which hosts a website with multiple links to copyright material might fall within Category D, 'referring users to an online location using information location tools or technology.'²

¹ The basic definition is found in *Telecommunications Act 1997* (Cth) s 87. However, understanding s 87 requires the reader to also read, and comprehend, *at least* the definitions of 'listed carriage service' (s 16), 'network unit' (Division 2, Part 2), 'carrier', which is defined to mean the holder of a 'carrier license', which is itself defined in s 56, 'nominated carrier declaration', defined in s 81, 'line link', defined in s 30, 'satellite-based facility', defined in s 7, and 'exempt network user', defined in s 7. An individual researching the question would also have to check whether the Minister had made any relevant declarations under s 87(4).

² *Cooper*, at [108].

It is not only ISPs, obviously, which host or operate websites.³ The result, therefore, of confining the exceptions to CSPs is to create an uneven playing field.

Whether Safe Harbours are available to a party should depend on their conduct, not on the formal identity of the party, not whether they are subject to other telecommunications regulation. The approach of using the *Telecommunications Act 1997* (Cth) should be abandoned completely.

2 The availability of the Safe Harbours should be extended

In my submission, the Safe Harbours should be extended, using the overseas laws as a model, so that the Safe Harbours apply to both providers of network access, and other providers of online services. This could be done using the language adopted by other, comparable jurisdictions, which enables any of the following to take advantage of the Safe Harbours:

- A person or entity who provides services relating to, or provides connections for, the transmission or routing of data; and
- A person who provides or operates facilities for online services or network access.

The benefit of this kind of language is that it can be applied in situations, and to technologies not yet predicted or developed. It accommodates innovation without requiring frequent amendment.

2.1 Safe Harbours may be important in providing clear rules for online ‘facilities’ or service providers

It is important to bear in mind that the Safe Harbours are not an exception to copyright law. They do not limit liability. Instead, they only limit the remedies available against parties who undertake certain activities. Extending the Safe Harbours provides significant advantages to copyright owners, as they do not lose the substantial enforcement and administrative savings of dealing with the intermediary rather than end users/infringers.⁴

The chief benefit of the Safe Harbours for online service providers is in creating straightforward rules for avoiding liability for copyright infringement. Clear rules are important for organisations such as universities because of the scale on which they operate, and the imperative to operate in a way which is compliant with law.

³ As, indeed, Schedule 5 to the *Broadcasting Services Act* recognizes. That law applies also to Internet Content Hosts.

⁴ On this, see generally Douglas Lichtman, William Landes, ‘Indirect Liability for Copyright Infringement: An Economic Perspective’ (2003) 16 *Harv J. L. & Tech.* 395, 397.

Clear rules also benefit innovating businesses developing technologies for online communication. Risk-taking and innovation in this space should be allowed.

Certainty is not just important for universities and businesses. There are many other providers of online services for whom copyright infringement is a risk, not an aim, of the business. These include search engines, bulletin board operators, web loggers ('bloggers'). Such entities are increasingly providing facilities for communication by others online. They provide valuable opportunities for information location, and free speech.⁵

Providers of these small communications services should be able to take advantage of the Safe Harbours. Uncertainty as to potential liability will, particularly for small players, tend to have a 'chilling effect' – risk averse entities will overcompensate by being more willing to remove material at the slightest (and most insubstantial) request. The prospect of copyright litigation is daunting for the most well-funded party, let alone new innovators or individuals. As a public commentator on IP law, and in particular, as someone who runs a weblog with a focus on copyright law, I frequently receive inquiries regarding possible liability for copyright infringement online. Many individuals running websites are concerned about copyright infringement, and have a desire to comply with the law.⁶

2.2 *Australian law on authorisation of infringement is currently uncertain*

Unfortunately, our current law is not certain, making compliance difficult, particularly for those not accustomed to dealing with copyright law on a regular basis. As was noted in the final report of the *Digital Agenda Review*:

'There is a strong sense from the submissions received by the review that section 39B (and section 112E) has not achieved its objective of clarifying the liability of Service Providers in relation to authorisation of infringement of copyright. There is also significant uncertainty as to the meaning of section 39B (and section 112E) and what has to be done by a Service Provider (or any other person who provides communication facilities) in order to avoid liability under section 36 (or section 101). ... Irrespective of the cause of that uncertainty, there is a clear consensus that the amendments have not achieved their objectives.'⁷

⁵ See the Deakin Innovation Lectures in 2005, which extolled the new environment being created by blogs and RSS feeds.

⁶ See, for example, my comments on my weblog, *Weatherall's Law*, on 25 May 2005, 'A quick lesson (to me) in copyright, fair use, fair dealing, and Creative Commons', available at <http://weatherall.blogspot.com/2005_05_01_weatherall_archive.html#111692440453727669>

⁷ Phillips Fox, *Digital Agenda Review: Report and Recommendation* (2004), [16.1]

If the law is uncertain to the ‘cognoscenti’, it is even more uncertain and unclear for those who for whom copyright is not the major part of their activities or business.

While there have been some recent decisions on authorisation, these have not significantly clarified the law. In recent times, we have had three decisions at first instance on authorisation liability:

- *APRA v Metro on George Pty Ltd* [2004] FCA 1123
- *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972
- *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.

One of these cases (*Sharman*) is currently on appeal;⁸ it is of course conceivable that that appeal will provide clear rules to guide the actions of technology providers. However, thus far, these three decisions have not led to clear law on authorisation in Australia, particularly for providers of technology (whether in the form of communications facilities or otherwise). In each case, the judge has relied on very specific facts in the case before them to hold a party liable for authorisation. This may provide a just result on the facts, but it provides little or no guidance for other businesses, or future innovators as to how to avoid liability.

For example, following from these decisions, a number of issues remain unclear:

- Whether or not it is always necessary for a party to have the power to prevent infringement, in order for them to be liable;
- What degree of ‘control’ over infringing activities is required for authorisation liability;
- Can there be authorisation of liability without knowledge?

Nor do other exceptions in the *Copyright Act* provide any comfort to non-CSPs. The other main exception, or defence introduced for online service providers is that found in ss 39B and 112E of the Act:

‘A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.’ (s 39B)

However, caselaw indicates that ‘mere’ provision of facilities will not give rise to authorisation liability. In both *Cooper*,⁹ and in *Sharman*¹⁰ the Federal Court had

⁸ Federal Court File Number NSD1809/2005 among others. Leave to appeal was granted on 10 October 2005.

⁹ *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 (‘*Cooper*’)

reason to consider this ‘defence’. In each case, the court found that the provider had done more than provide facilities. In *Cooper*, Tamberlin J held that ‘[t]he word ‘merely’ must be given its full force and effect’.¹¹ In that case, his Honour held that facts taking the case beyond s 112E were that the ISP agreed to host the website which was held to authorise infringement, assisted in operating the site, and displayed its logo on the website.¹² In *Sharman*, Wilcox J found that the respondents encouraged infringement by promoting file-sharing, and knew that copyright was being infringed using the software.¹³ His Honour noted that:

‘[Section] 112E does not preclude the possibility that a person who falls within the section may be held, for other reasons, to be an authoriser. Whether or not the person should be so held is to be determined, in the present context, by reference to s 101 of the Act.’¹⁴

The effect of these decisions is as follows:

- For a party to be held liable for authorisation of copyright infringement, ‘something more’ than merely providing facilities for the infringement is required;
- That same ‘something more’ which makes liability for authorising copyright infringement possible will *also* take the party beyond the s 39B/112E ‘defences’

In other words, it would appear that these ‘defences’ have no practical operation. They simply add another stage in the analysis a court must go through in determining authorisation liability.¹⁵

In these circumstances, in legal terms, when it comes to the protection of online services providers, ‘something more is required’. The Safe Harbour provisions have the potential to provide that ‘something more’.

It is, of course, arguable that the conditions on many of the Safe Harbours will prevent many entities from taking advantage of the Safe Harbours. This may well be true,¹⁶ and the details of the Safe Harbours are open to question, in my opinion. However, expanding the availability of the Safe Harbours merely provides online service providers with the option of such reliance. It would not mandate such reliance.

¹⁰ *Universal Music Australia Pty Ltd v Sharman License Holdings* [2005] FCA 1242 (‘*Sharman*’)

¹¹ *Cooper* at [126]

¹² *Cooper* at [126]

¹³ *Sharman* at [396] – [401]

¹⁴ *Sharman* at [399]

¹⁵ This is consistent with the interpretations pressed in the context of the *Digital Agenda Review* final report, [16.2] – [16.8].

¹⁶ For example, how does one ‘terminate’ the account of a blog commenter, while preserving the right to make anonymous comments?

2.3 *There is no reason why Australian law should be more restrictive, in conferring the benefits of the Safe Harbours, than law in other comparable jurisdictions*

One final additional point should be made. The provisions listed in the Issues Paper would, it seems clear, extend beyond providers of network access. In the US, a body need only be a ‘provider of online services ... or the operator of facilities therefore’. This definition could quite readily apply to an individual hosting a website. Similar arguments could be made in Singapore, or in Canada.

It is an argument frequently reiterated in expert reports, government reports and research papers, that it is not in Australia’s interests to have stronger, or more protective copyright law than other, comparable jurisdictions.¹⁷ To the extent that Australian law relating to safe harbours is currently more restrictive than any comparable jurisdiction, it should be presumed that specific justification is required for that law. The onus should be on proponents of the limitation to establish through credible evidence the benefits to Australia that result from the restriction of Safe Harbours to CSPs.

3 The way in which the extension is effected is important

A brief comment is warranted regarding the appropriate model for extending the benefit of the Safe Harbours provisions. Several options are open to the government:

1. Power could be given to the Minister to designate certain persons or entities as ‘carriage service providers’ for the purposes of Part V Division 2AA;
2. The provisions could be extended in the way that was done in ss 39B and s 112E, applying the exceptions to a ‘person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication; or
3. The provisions could be extended by the use of definitions modelled on the provisions from the US/Canada/Singapore: applying the provisions (as referred to above) to:
 - A person or entity who provides services relating to, or provides connections for, the transmission or routing of data; and

¹⁷ See, for example, Office of Regulation Review, *An Economic Analysis of Copyright Reform* (1995) available at <<http://www.pc.gov.au/orr/reports/submission/ecoanala/ecoanala.pdf>>; J. Revesz, *Trade-Related Aspects of Intellectual Property Rights*, Productivity Commission Staff Research Paper, May 1999, at <<http://www.pc.gov.au/research/staffres/trips/trips.pdf>>. See also D. Richardson, Parliamentary Library, ‘Intellectual Property Rights and the Australia-US Free Trade Agreement,’ Research Paper No. 14 2003-04, 31 May 2004, quoted extensively in Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report*, [3.9] – [3.52].

- A person who provides or operates facilities for online services or network access.

The first option is, in my opinion, the least preferable option, and should only be considered, if at all, *in conjunction* with one of the other approaches. The benefit of the approach is that it would enable institutions, such as Universities, to have the certainty of knowing that the Safe Harbour provisions definitely apply to them, through official pre-designation.

This benefit, however, is outweighed by the costs:

- The benefit of the Safe Harbours would largely be confined to large, well-informed, and well-advised parties such as Universities and large employers, as only such organisations would have the foresight or the information necessary to seek pre-designation. Smaller businesses or entities, who have policies for termination of copyright infringers, and who remove material on request, and who do not directly themselves infringe, would be deprived of the ability to rely on the Safe Harbour;
- Unnecessary complexity would be added to the *Act*. I have elsewhere commented on the undesirability of defining the same term (here carriage service providers) to mean different things in different contexts. It makes advising clients, discussing the law, and writing contracts harder.¹⁸
- Australian law would remain more restrictive and less open to technological and communications innovations than other comparable jurisdictions;
- An unnecessary bureaucracy would be created. Further, copyright owners would themselves have to monitor pre-designations in the context of their enforcement efforts;
- Presumably, overseas-based service providers would have to seek pre-designation – including large overseas entities such as Google, or eBay, or the like. This sets up unnecessary, and undesirable barriers to trade.

If the Minister were given the power to designate certain entities as having the ‘right’ to use the Safe Harbours *in addition* to broadening the language, this might be helpful for large, institutional and risk averse entities such as Universities, while avoiding these costs.

The second option is also, in my submission, undesirable. While it would be more ‘open’ than the first option, it would have the disadvantage of limiting the Safe Harbours to entities ‘who provides facilities for making, or facilitating the

¹⁸ See generally Kimberlee Weatherall, "'Pretend-y Rights.' On the Insanely Complicated New Regime for Performers' Rights in Australia, and how Australian Performers got Gyped" . *NEW DIRECTIONS IN COPYRIGHT: VOLUME II*, London: Edward Elgar Press, 2006 <http://ssrn.com/abstract=809905>. In that case, the language given different meanings in different parts of the act was ‘owner’ of a sound recording.

making of, a communication'. The scope of that language is, I would submit, unclear. Undoubtedly it is suitable for providers of network access, but it would not be suitable (or at least, its suitability would be in doubt) as applied to, for example, hosters of websites, and weblogs, and online auction sites.

It is therefore my submission that the third approach is best.¹⁹ It leaves the language open-ended, so that the meaning can be elaborated, if necessary in the future, by courts. It would not, however, lead to 'open slather' on copyright infringement because, as the Discussion Paper notes, the key issue will, in general, be the conduct and whether the conditions are fulfilled, rather than whether the technical definition of 'service provider' is fulfilled.

¹⁹ I express no view here on whether the distinction should be a two-tiered one or not. The important thing, in my view, is that the language be open in its texture.