Australian Digital Alliance

Submission on the final report of the Australian Competition and Consumer Commission Digital Platforms Inquiry

September 2019

Once again the Australian Digital Alliance (ADA) welcomes the opportunity to provide comment in relation to the Australian Competition and Consumer Commission (ACCC) Digital Platforms Inquiry; this time providing comments to the government in response to the final Inquiry report released by the ACCC on Friday 26 July 2019.

The ADA is a non-profit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy. It was founded following a meeting of interested parties in Canberra in July 1998, with its first patron being retired Chief Justice Sir Anthony Mason AC KBE QC. Its members include universities, schools, disability groups, libraries, archives, galleries, museums, research organisations, technology companies and individuals. The ADA unites those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture.

Our comments in this submission predominantly focus on recommendation 8 of the Inquiry, which proposes a mandatory ACMA digital platforms take-down code. We also make some comments on authorisation law and compensation for the use of news content on digital platforms in this submission.

In February the ADA made a submission to the ACCC in response to the preliminary report of the Digital Platforms Inquiry.[1] This previous submission provided a comprehensive outline of our concerns with introducing a mandatory takedown system for digital platforms and a number of other issues. The content of that submission remains relevant and provides important additional evidence for the points below. As such we have attached the earlier submission in its entirety for your reference.

[1] Available at https://digital.org.au/resources/accc-dpi-preliminary-report-submission/ or https://www.accc.gov.au/system/files/Australian%20Digital%20Alliance%20%28February%202019%29.PDF.

Executive summary

- We agree with the ACCC that Australia would benefit from a standardised takedown system for the removal of copyright infringing content posted by third parties to digital platforms.
- However, we strongly argue that the ACCC has erred in not following the example of multiple previous government reports to recommend that this standardisation be introduced by extending the existing safe harbour system – which already applies to all other service providers in these circumstances – to include all platforms providing the relevant online services.
- The ACCC's proposal to create an additional and separate takedown scheme, which duplicates and competes with both the established Australian safe harbour scheme and the internationally recognised DMCA takedown system, will only serve to add confusion and complexity, reducing the effectiveness and efficiency of these mechanisms for creators and platforms alike.
- It will have the illogical outcome that innocent platforms that follow the scheme's requirements and implement best practice tools to deal with copyright infringement could still be held liable for the acts of their users. Australian platforms are already at a significant disadvantage to their international counterparts due to the lack of a localised safe harbour scheme for their services. The ACCC proposal will result in Australian-based platforms being subject to more complexity, while at the same time increasing their risk of financial liability.
- The ACCC's proposal that the scheme include "measures to develop or update content-matching or unauthorised content identification software"[2] (i.e. copyright filters) is particularly concerning. Whilst such filters have a role in preventing infringement when used judiciously, they are unable to account for copyright exceptions, such as fair dealing, they have high error rates, and they can be abused by bad actors. If applied as a mandatory, industry-wide requirement, they run the risk of causing significant harm to the rights of individual Australians.
- Furthermore, the mandatory imposition of copyright filters would significantly advantage large established platforms who already have such filters in place over Australian-based startups and emerging platforms, who are unlikely to have the resources to develop or deploy such tools, due to the prohibitive costs.
- Finally, if a standardised takedown system is introduced in any form, it must include adequate consumer protections such as a functional review process and a right of reply for affected users
    - In addition:
        - we applaud the ACCC's decision not to recommend changes to the law regarding authorisation liability in Australia[3]
        - we do not support proposals by entertainment companies and rightsholder groups to introduce a mandatory licensing regime for news content such as snippets.

[2] ACCC (2019). 'Digital Platforms Inquiry Final Report', pp. 181 and 278, available at https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report.

[3] ACCC (2019). 'Digital Platforms Inquiry Final Report', p. 262.

Proposed takedown scheme

A standardised notice-and-takedown scheme

The ADA proposes that the government accepts the ACCC's recommendation to create a standardised notice-and-takedown scheme, but not accept the recommendation that this be implemented as a compulsory ACMA scheme. Rather, the government should follow the recommendations of previous reports – most notably that of the Productivity Commission's Intellectual Property Inquiry[4] – by expanding the existing safe harbour system to all service providers, and establish the relevant code as part of the safe harbour scheme.

As the ACCC notes, in the absence of a standardised notice-and-takedown regime digital platforms operating in Australia have developed a range of processes for rights holders to request the removal of copyright-infringing content. The ADA is supportive of a standardised takedown system. There are a range of benefits for all stakeholders to be derived from standardising notice-and-takedown, including the potential for simplified notification processes and consumer protections.

However, we do not support the ACCC's proposal that a standardised scheme be developed and enforced by the Australian Communications and Media Authority (ACMA). We strongly reiterate our past submission that the government should instead create a standardised takedown process by extending the existing safe harbour system set out in ss116AA–116AJ of the *Copyright Act 1968*. The safe harbour system already regulates all other service providers offering connectivity and hosting services in Australia, and creates a standardised scheme for the takedown of infringing content posted by users. The ADA and many of the sectors we represent have long advocated for extending this current system to include all online providers, including commercial digital platforms.[5]

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[4] *Productivity Commission Inquiry Report No. 78, Intellectual Property Arrangements* (23 September 2016), Recommendation 19.1. Available at http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf.

[5] See the following submissions for example:

- Australian Digital Alliance, *Submission to Senate Environment and Communications Committee Inquiry into the Copyright Amendment (Service Providers) Bill 2018* (January 2018), p. 6, available at https://digital.org.au/resources/senate-ec-copyright-amendment-online-infringement-bill-2018-inquiry-submission/ or https://www.aph.gov.au/DocumentStore.ashx?id=99d7c473-2bfa-4dcd-9f92-a3f1295269b8&subId=563011.
- Australian Digital Alliance, *Submission to the Senate Standing Committee on Environment and Communications Legislation Inquiry into the Copyright Amendment (Online Infringement) Bill 2017* (January 2017), pp. 7–8, available at https://digital.org.au/resources/senate-ec-copyright-amendment-service-providers-bill-2017-inquiry-submission/ or https://www.aph.gov.au/DocumentStore.ashx?id=6b5b2667-9277-499d-9e4d-a15af04c5e16&subId=662879.
- Australian Digital Alliance, *Submission to the Productivity Commission in response to the Draft Report on Australia's Intellectual Property Arrangements* (June 2016), pp. 13–14, available at https://digital.org.au/resources/pc-ip-arrangements-draft-report-submission or https://www.pc.gov.au/__data/assets/pdf_file/0004/201685/subdr578-intellectual-property.pdf.
- Australian Digital *Alliance, Submission to the Productivity Commission Intellectual Property Arrangements public inquiry* (December 2015), pp. 30–32, available at https://digital.org.au/resources/pc-ip-arrangements-submission or https://www.pc.gov.au/__data/assets/pdf_file/0006/195009/sub108-intellectual-property.pdf.
- Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission to the Department of Communication and the Arts Updating Australia's copyright laws consultation* (February 2016), p. 13, available at https://digital.org.au/resources/dca-copyright-amendment-disability-other-measures-consultation-ada-alcc-submission or

It is illogical and inefficient to create a separate and duplicate system when there is an adequate system in place – a system which international norms say should apply to all service providers, including digital platforms.

The ACCC's proposed notice-and-takedown code administered by ACMA would:

- go against the recommendations of multiple consecutive government reviews
- unnecessarily duplicate large parts of the safe harbour scheme that already exists in the *Copyright Act*
- fail to improve legal clarity or reduce risk for digital platforms
- add further complication to the already complex takedown law in Australia
- put Australia further out of step with international norms
- open the door to concerning developments such as mandatory copyright filtering.

In addition, if a standardised takedown system is introduced in any form, it is essential that it include consumer protections. Such safeguards have not adequately been prescribed by the ACCC in their recommendations.

Below we provide a brief overview of safe harbour and address each of the concerns listed in more detail.

About safe harbours

The concept of a copyright safe harbour scheme was first introduced by the U.S.A. as part of its 1998 Digital Millennium Copyright Act (DMCA) to reduce online infringement by incentivising online service providers to cooperate with copyright holders in the removal of infringing content. If intermediaries comply with certain requirements set out in copyright law they enjoy protection from financial liability arising from the infringing actions of their users. The system is designed to benefit rights holders, intermediaries and the economy by:

- establishing an efficient administrative system for handling infringing content online that avoids the expense and time involved in pursuing legal proceedings
- protecting users through the inclusion of 'right of reply' mechanisms for responding to inaccurate copyright takedown requests and/or exerting fair dealing rights
- stimulating technological innovation by generating legal certainty for online service providers.

The safe harbour concept was introduced into Australian law as part of amendments to implement the AUSFTA in 2005.[6] In 2018 the safe harbour system was expanded in Australia to include cultural, education and disability organisations but still does not include digital platforms.[7]

Importantly, safe harbour already prescribes a takedown scheme for infringing content shared by users of online services. Service providers are required to take infringing material down expeditiously as soon as they are notified

https://www.communications.gov.au/sites/default/files/submissions/40-submission-australian-digital-alliance-australian-libraries-copyright-committee-updating-australias-copyright-laws.docx.

[6] See Part 11: Limitation on remedies available against carriage service providers of the *US Free Trade Agreement Implementation Act 2004*, available at https://www.legislation.gov.au/Details/C2005C00021.

[7] See the *Copyright Amendment (Service Providers) Act 2018*, https://www.legislation.gov.au/Details/C2018A00071.

of infringing material, or otherwise become aware of it, to access the safe harbour protections. The scheme also sets out other requirements in relation to how service providers handle infringing behaviour by their users, such as requiring platforms to have a policy for the termination of the accounts of repeat infringers, and provides for the option of an industry code to deal with other related issues.

For a comprehensive history and overview of safe harbour we strongly encourage the government to read pages 5–8 of our submission to the ACCC in relation to the Digital Platforms Inquiry preliminary report.[8]

ACCC goes against multiple government reports

Since the Australian safe harbour scheme was first introduced in 2006 consecutive government reports have recommended extending it to include digital platforms. Recent examples include the Attorney General's Department's Online Copyright Infringement Discussion Paper[9] published in 2014 the Productivity Commission's 2016 Report into Australia's Intellectual Property Arrangements[10] and the 2016 Joint Standing Committee on the Trans Pacific Partnership.[11]

For a comprehensive overview of these reports and their recommendations see pages 7 and 8 in the attached submission we made to the ACCC in relation to the preliminary Digital Platform Inquiry report.[12]

While the safe harbour scheme has already been extended to cover cultural, education and disability organisations, recommendations calling for the extension of the scheme envisaged including digital platforms. The Productivity Commission, for example, said that, "Online service providers, such as cloud computing firms, would face fewer impediments to establish operations in Australia," and "The copyright system will be more adaptable as new services and technologies are developed, facilitating greater innovation"[13] if safe harbour included digital platforms. Further, the Productivity Commission said, "The Australian Government should proceed with its proposal to expand the safe harbour scheme to encompass the full range of online service providers, as occurs in other Countries."[14]

In 2018 when the safe harbour scheme was extended to include cultural, education and disability organisation then Minister for Communications and Minister for the Arts Senator the Hon Mitch Fifield said the passing of the *Copyright Amendment (Service Providers) Act 2018* was a "first step" in modernising Australia's safe harbour scheme and that the government would "continue to work with stakeholders on reforms to the safe harbour scheme to ensure it is fit for purpose and reflective of world's best practice."[15] This commitment to further consult

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[8] Australian Digital Alliance, *Submission to the ACCC in response to the Digital Platforms Inquiry Preliminary Report* (February 2019), pp. 5–8, available at https://digital.org.au/resources/accc-dpi-preliminary-report-submission/ or https://www.accc.gov.au/system/files/Australian%20Digital%20Alliance%20%28February%202019%29.PDF.

[9] Attorney General's Department, Proposal 3, *Online copyright infringement: discussion paper*, July 2014, p. 7.

[10] See *Productivity Commission Inquiry Report no.78, Intellectual Property Arrangements* (23 September 2016), Recommendation 19.1, available at http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf.

[11] See Parliament of the Commonwealth of Australia, *Joint Standing Committee on Treaties, Report 165 Trans-Pacific Partnership Agreement*, Recommendation 4 at 7.28, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TransPacificPartnership/Report_165.

[12] Australian Digital Alliance, *Submission to the ACCC in response to the Digital Platforms Inquiry Preliminary Report* (February 2019).

[13] See *Productivity Commission Inquiry Report no.78, Intellectual Property Arrangements* (23 September 2016), p. 29.

[14] See *Productivity Commission Inquiry Report no.78, Intellectual Property Arrangements* (23 September 2016), p. 551.

[15] Senator the Hon Mitch Fifield, Major reform to copyright safe harbour legislation (6 December 2017) available at https://www.minister.communications.gov.au/minister/mitch-fifield/news/major-reform-copyright-safe-harbour-legislation.

on the issue of platforms was endorsed by the Senate Environment and Communications Legislation Committee in its report on the 2018 Bill.[16]

Extend the safe harbour, do not create a duplicate scheme

We do not understand the ACCC's call for a separate mandatory takedown code administered by ACMA. Establishing such a code would result in an unnecessary duplication of the existing safe harbour system; a system that is already operating effectively for all other service providers in Australia.

We submit the following points in relation to the existing safe harbour system:

- The system already addresses the activities raised as concerns by rights holders, such as compelling platforms to remove infringing material, removing that material 'expeditiously' and terminating access by repeat infringers. Further to this, we direct the government to pages 14–16 of our submission to the ACCC in relation to the preliminary Digital Platform Inquiry report in which we highlighted how the current safe harbour system already addresses the areas of concern raised by rights holder submissions to the ACCC.[17]
- Many of the features that the ACCC recommends be included in the ACMA code, including establishing reasonable timeframes for the removal of infringing content and sanctioning users who commit multiple or regular infringements are already part of safe harbour.
- The safe harbour system has the capacity for an industry code that could be used to address the additional issues the ACCC suggests be addressed by the proposed AMCA code, such as standardised policies for repeat infringers and timeframes for removal of content. Indeed, it is unclear what issues the ACCC feels should be included in the ACMA code that are not already dealt with in the safe harbour scheme, or contemplated in its industry code provisions.

The ACMA scheme would not provide legal clarity

The safe harbour system reduces online infringement by incentivising digital platforms to cooperate with copyright holders by providing protection for compliant platforms who expeditiously remove infringing material. This protection provides both an incentive for them to adopt the system and, importantly, the legal clarity they require to operate effectively. At several places in its final report the ACCC emphasised the importance of clarifying the legal position of service providers.[18] Yet the ACCC recommendation does nothing to provide this increased legal clarity. Under the ACCC proposal, a digital platform could comply with the ACMA code and receive no legal benefit; they could take all steps required and still be held liable for the infringements of their clients. Worse, they will be at increased risk, as they may be fined if, for some reason, they are unable to comply.

The ACCC proposal will not change or provide additional clarity to the legal position of platforms or rights holders. The ACCC claims that compliance with the code could be taken into account by a court to reduce the chance of

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[16] Senate Environment and Communications Legislation Committee, *Copyright Amendment (Online Infringement) Bill 2018* - Report (26 November 2018) at 2.56, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/OnlineInfringementBill/Report.

[17] Australian Digital Alliance, *Submission to the ACCC in response to the Digital Platforms Inquiry Preliminary Report* (February 2019), in particular Table 2.

[18] See for example, ACCC (2019). 'Digital Platforms Inquiry Final Report', pp. 261–263.

platforms being held liable under authorisation law. Yet the Redbubble case[19] shows this is unlikely to be the case. Redbubble had undertaken best practice takedown procedures similar to those proposed by the ACMA code, and was still held liable for authorising the infringements of its users. Furthermore, Redbubble was also found to be directly liable for the infringing activities initiated by its users. There is no room for code compliance to be considered as a factor under direct liability, and so the new code would provide no assistance to platforms in this area. Without extending the safe harbour scheme to digital platforms Australian law will continue to place significant legal uncertainty and risk on any platform that chooses to operate here, as they could comply with the code and still be held to be liable for their clients' activities.

We provide more detail on this issue in pages 5 and 9 of our submission commenting on the preliminary report of the ACCC's Digital Platforms Inquiry.[20]

Safe harbour is essential and the international standard

It is for this reason that the rest of the world has reached the compromise it has – requiring platforms to takedown material expeditiously and setting standards for this takedown while rewarding compliant platforms with legal protection against both authorisation and direct liability. The "safe harbour" element of the scheme (i.e. the legal protection from financial liability) is intended not only to provide an incentive for service providers to comply with the scheme – a carrot to go with the stick – it is also essential to create the legal clarity that everyone claims to seek.

Australia's safe harbour takedown system in the *Copyright Act* is based on the AUSFTA, which in its turn is based on the scheme in the U.S. *Digital Millennium Copyright Act*. Similar requirements are contained in other U.S. free trade agreements, including with Chile, Korea and Singapore. As such, the safe harbour system has emerged as the international norm for dealing with notice-and-takedowns.

Australia is isolated internationally by not providing its online service providers with protection from liability for copyright infringements undertaken by users. Our current situation sees Australian-based digital platforms left vulnerable to substantially higher risk than their international counterparts; risk that is not hypothetical, as illustrated by the recent *Redbubble* decision.[21]

For reference, we have extracted a table from Professor Kimberlee Weatherall's report *Internet Intermediaries and Copyright – A 2018 Update* which illustrates the substantial legal risk that already applies to Australian platforms in relation to their international peers.

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[19] *Pokèmon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541, available at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541.

[20] Australian Digital Alliance, *Submission to the ACCC in response to the Digital Platforms Inquiry Preliminary Report* (February 2019).

[21] *Pokèmon Company International, Inc. v Redbubble Ltd*.

Table 1: How risky is internet intermediary business?[22]

Country	Providing internet access (IAP)	System level/proxy caching	Hosting (Cloud Computing)	Hosting a user-generated site	Running a search engine or similar
Australia: carriage service provider and non-commercial online service providers	Green	Green	Green	Green	Green
Australia: other commercial online service provider	Green	Red	Red	Red	Red
Australia: public sector institutions with passage of Service Providers Bill	Green	Green	Green	Green	Green
United States	Green	Green	Green	Green	Green
Canada	Green	Green	Green	Green	Green
European Union	Green	Green	Green	Orange	Red
United Kingdom	Green	Green	Green	Orange	Red
New Zealand	Green	Green	Green	Orange	Red
Singapore	Green	Green	Green	Green	Green
Japan	Green	Green	Red	Red	Green
South Korea	Green	Green	Orange	Orange	Orange
Israel	Green	Green	Orange	Orange	Orange

Red = activities involve a high risk of liability for copyright infringement
Orange = legal situation is unclear, some risk
Green = low or non-existent risk of copyright infringement

The ACCC's proposal would see an entirely new takedown system added instead of utilising the recognised international standard. This would further place Australia as an outlier globally, and continue the unnecessary risk Australian platforms are subjected to. As we said in our submission in response to the ACCC's Digital Platform Inquiry preliminary report: "Overall, it is those Australian platforms that want to stay in this country and develop better applications and digital platforms, and the creators and consumers that are denied access to them, who will be the losers if the ACCC's proposal is adopted in preference to the expansion of the existing safe harbour laws."[23]

[22] Adapted from Kimberlee Weatherall, *Internet Intermediaries and Copyright – A 2018 Update* (February 2018), available at https://digital.org.au/resources/internet-intermediaries-and-copyright-a-2018-update/. In the interest of disclosure please be aware the report was produced with funding from the ADA.

[23] Australian Digital Alliance, *Submission to the ACCC in response to the Digital Platforms Inquiry Preliminary Report* (February 2019), p. 9.

For a comprehensive overview of safe harbours as the international standard for takedown see pages 8–10 of the submission we made to the ACCC in relation to the Digital Platform Inquiry preliminary report.[24] Also see *Internet Intermediaries and Copyright – A 2018 Update* by Professor Kimberlee Weatherall.[25]

The ACMA scheme would further complicate takedown law

Not only will the ACCC proposal not add certainty to Australian law regarding removal of infringing content online, it will actually increase its complexity. It would result in a more difficult and confusing situation for rights holders, service providers and ordinary Australians alike. They will be expected to navigate a far more complex system whereby they are expected to understand the difference between requesting takedown when their materials are shared on a platform versus when they are shared on an ISP hosted website.

While major media conglomerates who are capable of hiring experts and negotiating direct licences with large multinationals may preference a separate system that can be designed to reflect their own interests, it is important to remember that the system is also going to be used by small creators who wish to have their material taken down, and will also significantly affect individuals whose material has been taken down. These stakeholders in particular are likely to find the additional layer of regulation confusing. To illustrate this – individual creators would need to know which takedown procedure applies based on the location at which the infringement occurred (e.g. when their copyright material was shared on a digital platform versus on an ISP-hosted website) and/or whether that location was hosted in Australia or overseas. Addressing the issues of concern raised by the ACCC through the established safe harbour scheme is a far more logical and efficient solution than the creation of a competing and duplicate system.

We provide an overview of how separate takedown systems will create confusion and increase costs on page 23 of our submission to the ACCC in relation to the Digital Platform Inquiry preliminary report.[26]

Scope creep may see mandatory filtering become part of the ACMA scheme

In addition we are concerned that the ACCC seems to contemplate that the scheme may be used to introduce mandatory copyright filtering in Australia. Mandatory filtering is problematic for a number of reasons, which are outlined more fully, with evidence, in pages 19–22 of our submission to the ACCC Digital Platforms Inquiry preliminary report.[27] However, in summary:

- rights management technologies are extremely difficult and costly to develop and apply. Requiring small startups to adopt such technologies from the outset places a cost and technological burden on them that will prevent them from developing or competing in the marketplace.[28] This will substantially

[24] Australian Digital Alliance, *Submission to the ACCC in response to the Digital Platforms Inquiry Preliminary Report* (February 2019), pp. 8–10.

[25] Available at https://digital.org.au/resources/internet-intermediaries-and-copyright-a-2018-update/. In the interest of disclosure please be aware the report was produced with funding from the ADA.

[26] Australian Digital Alliance, *Submission to the ACCC in response to the Digital Platforms Inquiry Preliminary Report* (February 2019).

[27] Australian Digital Alliance, *Submission to the ACCC in response to the Digital Platforms Inquiry Preliminary Report* (February 2019), pp. 19–22.

[28] Google, for example, reports that it has invested over $100 million in developing its Content ID technology for YouTube. See Google, 'How Google Fights Piracy' (November 2018), p. 27, available at https://www.blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf.

advantage the established dominant international platforms, which already have their own proprietary filter technologies in place.

- filters hold a significant risk of error and abuse. They frequently block legitimate content, even where it has been uploaded by the rights holder themselves;[29] they incorrectly identify Public Domain material;[30] they are unable to distinguish legitimate uses under copyright exceptions such as fair dealing;[31] and they have been deliberately abused by bad actors.[32]
- the negative effect of inaccurate filters is likely to be even greater in Australia, as there is no fair use exception that can be used to challenge takedowns.

The introduction of changes to EU law proposed by the EU Directive on Copyright in the Digital Single Market[33] (Copyright Directive) that are widely interpreted to require mandatory filtering were highly controversial and have been met with scepticism as to the practicality of implementing them and their legality. For example the Polish government has issued a challenge to Article 17 of the Copyright Directive in the Court of Justice of the European Union on the basis that it is "a disproportionate measure that fuels censorship and threatens freedom of expression" and as such "is forbidden by both the Polish Constitution and EU law – the Charter of Fundamental Rights guarantees freedom of expression."[34]

Consumer protections not included in proposed ACMA takedown scheme

The ACCC has made limited references to consumer interests in its proposal for an ACMA code. It is essential that any takedown system includes adequate consumer protections such as a working review process and a right of reply for impacted users. These mechanisms are explicitly built into the safe harbour system which, for example, includes a mechanism for responding to inaccurate copyright takedown requests and/or claiming fair dealing rights. Whether the code is developed as part of the safe harbour system or independent to it it is essential that equivalent consumer representatives are included in the drafting and development of the code.

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29 See, for example, Daniel Nazer, 'Topple Track Attacks EFF and Others With Outrageous DMCA Notices', (Electronic Frontier Foundation (EFF), 9 August 2018), available at https://www.eff.org/deeplinks/2018/08/topple-track-attacks-eff-and-others-outrageous-dmca-notices.

30 See, for example, EFF, 'Sony Finally Admits It Doesn't Own Bach and It Only Took a Bunch of Public Pressure' (nd.), available at https://www.eff.org/takedowns/sony-finally-admits-it-doesnt-own-bach-and-it-only-took-public-pressure.

31 See, for example, Eriq Gardner, 'Lawrence Lessig Sues Over Takedown of YouTube Video Featuring Phoenix Song' (Yahoo Entertainment, 23 August 2013) available at https://www.yahoo.com/entertainment/news/lawrence-lessig-sues-over-takedown-youtube-video-featuring-050000789.htm. See also DMCA Horror Stories, 'Sony takedown over Martin Luther King speech' (nd.), available at https://www.takedownabuse.org/stories/sony_vs_fight_for_the_future/.

32 A very recent example of bad actors abusing the notice-and-takedown system involved alleged 'copyright troll' Christopher Brady issuing fraudulent takedown claims against YouTube users and contacting those users demanding a financial payment from them or face being issued with another takedown claim (users risk termination of their account if three claims are made against their account). Google has reportedly initiated court proceedings against Christopher Brady. See Julia Alexander, 'YouTube sues alleged copyright troll over extortion of multiple YouTubers' (The Verge, 19 August 2019), available at https://www.theverge.com/2019/8/19/20812144/youtube-copyright-strike-lawsuit-alleged-extortion-minecraft.

33 Available at https://ec.europa.eu/commission/priorities/digital-single-market_en.

34 See Natalia Mileszyk, 'The Copyright Directive challenged in the CJEU by Polish government' (Communia, 1 June 2019), available at https://www.communia-association.org/2019/06/01/copyright-directive-challenged-cjeu-polish-government/.

Other issues

No change to authorisation law

The ADA strongly supports the ACCC's decision not to recommend changes to Australian authorisation law.[35]

As the High Court noted in the *ii*Net case,[36] the *Copyright Act* was amended by the *Copyright Amendment (Digital Agenda) Act 2000*[37] "… to respond to new communications technology by attempting to strike a balance between conflicting policy consideration" thrown up by increased internet usage in Australia.[38] The Amendment Act made numerous changes to the *Copyright Act* including "… [codifying] at least partially common law developments in relation to authorisation."[39] While there remains conflicting views on Australia's authorisation law[40] the policy objective of striking the right balance has not changed.

While rightsholders argue the authorisation system does not apply sufficient liability to service providers a close reading of the *Redbubble* case challenges that claim. In that matter the Australian company Redbubble has already been held liable under the existing authorisation law for infringing actions initiated by its users in exactly the circumstances about which rights holders raise concerns. It is unclear how the law on authorisation could be altered to make companies like Redbubble 'more' liable.[41] In light of that we are strongly of the opinion that there is no justification for altering it at this time. We provide more detail on Australia's authorisation law and the *Redbubble* case in pages 11–14 of our submission commenting on the preliminary report of the ACCC's Digital Platforms Inquiry.[42]

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35 ACCC (2019). 'Digital Platforms Inquiry Final Report', p. 262.

36 *Roadshow Films Pty Ltd & Ors v iiNet Ltd* [2012] HCA 16, available at http://eresources.hcourt.gov.au/showCase/2012/HCA/16.

37 *Copyright Amendment (Digital Agenda) Act 2000* (Cth), available at https://www.legislation.gov.au/Details/C2004C01235.

38 *Roadshow Films Pty Ltd & Ors v iiNet Ltd* [2012] HCA 16 at 10.

39 *Roadshow Films Pty Ltd & Ors v iiNet Ltd* [2012] HCA 16 at 9.

40 ACCC (2019). 'Digital Platforms Inquiry Final Report', pp. 261–262.

41 See *Pokèmon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541, available at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541.

42 Australian Digital Alliance, *Submission to the ACCC in response to the Digital Platforms Inquiry Preliminary Report* (February 2019).

Compensation for the use of news content on digital platforms

The ADA does not support the introduction of a mandatory licensing regime for news content shared on digital platforms e.g. snippets.

We also support the ACCC's decision not to recommend changes to restrict the legal sharing of news content online. In its final report the ACCC notes that a number of submissions – most notably News Corp, Free TV and Copyright Agency – suggest media businesses be compensated by digital platforms for the use of their news content e.g. snippets.[43] In particular Copyright Agency proposed that it administer the collection and payment of royalties for the use of news content on digital platforms including snippets.

We do not support a mandatory licensing regime for snippets. We agree with the ACCC's reasoning, namely that such a regime:

- is likely to experience implementation issues[44]
- would have a negative impact on how news is distributed through digital platforms such as limiting users' ability to share news content freely and participate in the public dialogue necessary for the democratic process[45]
- has not worked when adopted by other countries, such as the experience in Germany included in the ACCC final report[46]
- has no justification, as, in the ACCC's own words, it is "unclear why digital platforms should compensate media businesses for use of content while not offering compensation to other content creators and websites."[47]

Similarly we agree with the ACCC that the true impact of Article 15 of the Copyright Directive, which seeks to introduce such a licensing scheme, is as yet unknown.[48] It will take several years before countries are able to implement it at the domestic level, and several more before the effects of the new laws will be apparent. We also

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43 ACCC (2019). 'Digital Platforms Inquiry Final Report', p. 232.

44 ACCC (2019). 'Digital Platforms Inquiry Final Report', p. 231.

45 ACCC (2019). 'Digital Platforms Inquiry Final Report', p. 231.

46 To illustrate, "Axel Springer, one of the largest media businesses in Europe, has made public statements about the positive effect of snippets on its business. As a result of a German copyright law requiring Google to pay fees to publish snippets from news media websites, Google stopped showing snippets from their news articles. Axel Springer noted that the lack of snippets led to a nearly 40 per cent decline in referral traffic from Google Search and an almost 80 per cent decline in referral traffic from the Google News user interface": ACCC (2019). 'Digital Platforms Inquiry Final Report', p. 231.

47 ACCC (2019). 'Digital Platforms Inquiry Final Report', p. 254.

48 See Australian Digital Alliance, *Supplementary submission to DFAT in response to the negotiation of a Free Trade Agreement (FTA) with the European Union (EU)* (January 2018), pp. 2–4, available at https://digital.org.au/resources/dfat-a-eufta-supplementary-submission/ or https://dfat.gov.au/trade/agreements/negotiations/aeufta/submissions/Documents/australian-digital-alliance-supplementary-aeufta-submission.pdf.

note that it is strongly opposed by many academics,[49] human rights advocates and independent publishers,[50] who warned of potential negative impacts such as:

- impeding free speech and the free flow of information by limiting linking, quotation and use of snippets
- cementing the dominance of the major media conglomerates and exacerbating existing media market concentration by incentivising platforms to select material only from easily licensed sources
- harming players in the news market other than the major publishers, including journalists, photographers, citizen journalists, and the growing number of freelancers, who rely on references from aggregators and who would see their bargaining position weakened with respect to large publishers and platforms.

Further, such proposals do not represent the value exchange and benefits received by publishers for having links to their content featured on digital platforms. In any event, for many publishers their concern is not that their content features on such platforms, but whether it is sufficiently prominent as to gain the attention of users. For more criticism of Article 15 'link tax' see our submission to the Department of Foreign Affairs and Trade (DFAT) in relation to the negotiation of the Australia-European Union Free Trade Agreement.[51]

It would be extremely premature for Australia to commit to local adoption of a controversial initiative at this early stage in its development. Members of the EU are not required to implement the Copyright Directive provisions until 7 June 2021. As such it will be several years before it is clear how the Copyright Directive will impact creators, businesses and consumers. We recommend deferring conversations on the issue of compensation for the use of media content until an analysis of the impact of the Copyright Directive can be undertaken.

For a more detailed discussion of compensation for the use of news content on digital platforms and the Article 15 'link tax' see our submission to DFAT in relation to the negotiation of the Australia-European Union Free Trade Agreement.[52]

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[49] See, for example, an open letter by 169 academics, *Academics Against Press Publishers' Right* (24 April 2018), available at https://www.ivir.nl/academics-against-press-publishers-right/. See also *Position Statement of the Max Planck Institute for Innovation and Competition on the Proposed Modernisation of European Copyright Rules: Part E Protection of Press Publications Concerning Digital Uses* (21 February 2017), available at https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI_Position_Statement_PART_E_Publishers_2017_02_21_RMH_VM-def-1.pdf.

[50] See *Open letter to the Austrian Presidency of the European Council and rapporteur Axel Voss MEP on Article 11 and Recital 32 of the proposed Copyright Directive*, European Innovative Media Publishers (29 October 2018), available at http://mediapublishers.eu/2018/10/29/open-letter-to-the-austrian-presidency-of-the-europeancouncil-and-rapporteur-axel-voss-mep-on-article-11-and-recital-32-of-the-proposed-copyright-directive/.

[51] Australian Digital Alliance, *Supplementary submission to DFAT in response to the negotiation of a Free Trade Agreement (FTA) with the European Union (EU)* (January 2018), pp. 4–6.

[52] See generally Australian Digital Alliance, *Supplementary submission to DFAT in response to the negotiation of a Free Trade Agreement (FTA) with the European Union (EU)* (January 2018).