

30 January 2018
Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600
ec.sen@aph.gov.au

Copyright Amendment (Service Providers) Bill 2017
Submission by Copyright Advisory Group to the COAG Education Council (CAG)

This submission is made by the Copyright Advisory Group (Schools) to the Council of Australian Governments' Education Council (CAG). CAG is assisted by the National Copyright Unit (NCU), a small secretariat based in Sydney.

CAG members include Commonwealth, State and Territory Departments of Education, all Catholic Education Offices and the Independent Schools Council of Australia. On copyright matters, CAG represents the almost 9500 primary and secondary schools in Australia and their 3.5 million students.

CAG welcomes the *Copyright Amendment (Service Providers) Bill 2017* (the Bill), and urges the Parliament to introduce it as a priority. CAG appreciates the opportunity to provide these comments on the Bill.

Why Australian schools need the protection of the copyright safe harbours

Virtually every aspect of education today involves some use of digital technology. The development of "digital literacy" skills is a core educational objective, with pivotal education resources such as the new Australian Curriculum being presented online. Today's classrooms are interactive and connected. Students create, store, edit and reuse digital material for educational purposes. These activities also extend beyond the classroom: in 'flipped' classrooms, rather than the teacher teaching in class and the students doing homework at home, students study a topic at home using online resources and apply their knowledge in the classroom by solving problems and doing practical work. In the course of any single day, students may be involved in educational activities using an interactive whiteboard, a laptop or PC, a tablet, a smartphone or iPod/MP3 player - and increasingly students are exposed to technologies such as 3D printers, document cameras and virtual reality headsets. All of these devices are likely to be connected to the internet.

Schools are tasked with educating a generation of students that will need to be highly skilled in the use of information and communication technologies when they enter the workplace. Developing digital talent and skills - and particularly those in STEM (science,

technology, engineering and maths) - is one of the four key pillars of the National Innovation and Science Agenda.¹

This, of course, means that schools, TAFEs, and their governing bodies - including State and Territory Departments of Education - are providing network access and online services to **millions of students and staff every day**. Schools and TAFEs provide transmission services and caching facilities to students and teachers. They host content on local networks. They also operate intranets and learning management systems through which students are referred to various online locations.

Increasingly, consistent with community and government expectations, schools and TAFEs also employ digital technology to engage more widely with parents and the community. TAFE colleges in particular have strong relationships with local businesses in the course of providing vocational education. By their very nature, these digital technologies involve making copies and communications, and that potentially exposes schools to a risk of copyright infringement that did not exist in a pre-digital classroom.

While schools and TAFEs take all reasonable steps to ensure, so far as possible, that their systems and facilities are not used to infringe copyright, they remain vulnerable to actions by copyright owners in respect of alleged infringing conduct by staff and students using school owned IT systems and computers for educational purposes.

Australian schools are model citizens. They do not want to be conduits for online copyright infringement. They do not need a legal threat hanging over them just for providing internet access to their staff and students — access that is integral to developing the talent and skills, particularly science, technology, engineering and maths skills — that are at the heart of the Australian government's innovation agenda.²

For that reason, CAG strongly welcomes the Bill, which would extend the protection of the safe harbours to schools and TAFEs. This long overdue reform would put Australian schools and TAFEs on the same footing as their counterparts in the US, who can claim the benefit of US Digital Millennium Copyright Act safe harbours - on which the Australian safe harbour regime was intended to be based. It would remove the long-standing anomaly that has led to Australian schools and TAFEs having less legal protection than commercial ISPs such as Telstra and Optus with respect copyright infringements by users.

Ensuring the Bill operates as intended

CAG wishes to raise a minor drafting issue which, if not resolved, may have the unintended consequence of excluding some school internet services from the protection of the safe harbours.

¹ <https://www.innovation.gov.au/page/agenda>

² Daniele Cronin, Opinion Piece *Copyright law forgot schools*, The Australian, 26 April 2017
<https://www.theaustralian.com.au/opinion/copyright-law-forgot-schools/news-story/9928c89b4b451af9feed89e9b590e21b>

Increasingly, schools and TAFE's³ - - rely on third party, cloud-based providers to carry out some or all of the activities that fall within the scope of the safe harbours. This is line with government policy at Commonwealth and State and Territory level.⁴

It is possible that the current drafting could potentially be construed as limiting the protection of the safe harbours to activities that are carried out “**by**” one of these entities itself, which could potentially leave such entities unprotected in the event that the relevant activities were carried out by a third party provider “**on behalf of**” the entity.

We understand the legislative intention is that all entities that fall within the expanded definition of “service provider” would have the benefit of the safe harbours regardless of whether or not the relevant activities were carried out “by them” or “on their behalf” by a third party provider. For better certainty, however - and to avoid the potential for schools and TAFE's to be exposed to costly litigation in order to settle any uncertainty - CAG submits that it would be preferable to include a provision that made it abundantly clear that the safe harbour extended to activities that were carried by a third party provider “on behalf” of an entity that is a “service provider” under the Bill.

For example, a new subsection could be introduced similar to:

If this Division applies to activities carried out by a service provider, it also applies, in like fashion, to activities carried out by a third party on behalf of that service provider.

or

A service provider is not prevented from relying on this Division merely because the activities are carried out not by the service provider itself, but by a third party on behalf of the service provider.

CAG thanks the Committee for the opportunity to provide these comments. For any further information on the issues raised in this submission please contact Ms Delia Browne, National Copyright Director or

Yours sincerely

Delia Browne
NATIONAL COPYRIGHT DIRECTOR

³ As well as other organisations such as libraries that would be included in the definition of “service provider” pursuant to ss 116AB(1) (b) to (f), and 116B(2) of the Bill

⁴ See, for example, <https://www.dta.gov.au/blog/a-new-approach-to-cloud/>; <https://www.qgcio.qld.gov.au/ict-strategy/cloud-computing>