Computer & Communications Industry Association
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February 6, 2018

Via Electronic Mail: ec.sen@aph.gov.au

Committee Secretary
Senate Environment and Communications Legislation Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Committee Secretary:

The Computer & Communications Industry Association (CCIA) represents large, medium, and small companies in the high technology products and services sectors, including Internet products and services, electronic commerce, computer hardware and software, and telecommunications.[1] CCIA offers the following additional comments regarding the proposed Copyright Amendments (Service Providers) Bill 2017. As some submissions have suggested that ongoing U.S. and EU processes militate against taking action on intermediary liability protections, these comments supply additional information about the status of ongoing reviews of intermediary liability law in the United States and the European Union (EU).

In short, neither U.S. nor EU law is likely to change in a manner that would provide a basis for refraining from bringing Australian law into compliance with existing international obligations.

1. The U.S. Commitment to Safe Harbours and the U.S. Copyright Office Study

The liability protections for online intermediaries found in the Australia-U.S. Free Trade Agreement are enshrined in U.S. law under the Digital Millennium Copyright Act (DMCA) and have appeared in every U.S. free trade agreement in the past 15 years. Promoting safe harbours for intermediaries has remained a key part of U.S. trade policy.[2] Material amendments to these critical provisions are highly unlikely, as they would implicate commitments made in trade agreements with over a dozen U.S. trading partners.

As has been noted in other submissions, the U.S. Copyright Office is one of various entities engaged in policy studies of U.S. copyright law. Among the active studies is an examination of the operation of the safe harbours framework. The study was launched in 2015 and is ongoing. The initiation of a study is no indication that the law is about to change in any way. The Office has not yet issued a report or offered any recommendations, and a conclusion is not necessarily in the near future. When the Office previously undertook a Section 512 rulemaking regarding agent designation processing, nearly two decades passed between the initial Federal Register notice and Final Rule.[3] By contrast, the U.S.

[1] A list of CCIA members is available at https://www.ccianet.org/members.
[2] The Office of the U.S. Trade Representative reiterated in 2017 that the digital trade goals of the United States will be to promote safe harbours for ISPs comparable to those in U.S. law. *See* https://ustr.gov/sites/default/files/Digital-2-Dozen-Updated.pdf.
[3] *Compare* 63 Fed. Reg. 59,233 (Nov. 3, 1998) *with* 81 Fed. Reg. 75,695 (Nov. 1, 2016) (amended by 82 Fed. Reg. 21,696 (May 10, 2017)).

Commerce Department's Patent and Trademark Office, which is tasked with advising the U.S. Administration on national intellectual property policy,[4] has already issued two lengthy sets of recommendations on copyright, and not recommended any changes to Section 512.

The Copyright Office is a federal administrative department within the Library of Congress that oversees the federal registration of copyrights and advises Congress on policy and legal questions often through periodic consultations. Only through an action of Congress can the safe harbour regime be amended or changed, and there are presently no legislative proposals in the U.S. Congress to do so. The relevant Committee recently concluded a series of twenty Congressional hearings on copyright-related issues, including the Section 512 safe harbours, and declined to include amending the DMCA in its list of legislative priorities for copyright.[5]

2. Proposals in the EU

Intermediary liability protections remain firmly rooted in EU law. The European Commission has publicly announced that the E-commerce Directive (2000/31/EC) and its intermediary liability protections will not be amended. Discussions on intermediary liability in the context of the proposal for a Directive on Copyright in the Digital Single Market are highly controversial; negotiations are ongoing. Nevertheless, the EU's commitment to strong intermediary liability protections remains a key feature in EU FTAs. Such protections are included in the EU-South Korea FTA (formally ratified in December 2015) and in other agreements such as with Ukraine. The European Parliament, which would have to approve any possible future EU-Australia FTA, reconfirmed in its "Digital Trade Strategy" (November 2017) that "intermediary liability protections, should be promoted in all trade negotiations."[6] It underscored that "the principles of the E-commerce Directive (2000/31/EC) have contributed to the development of the digital economy by creating favourable conditions for innovations and by guaranteeing freedom of speech and the freedom to conduct a business; recalls that the Commission is bound by the EU *acquis* in its trade negotiations."[7]

Respectfully submitted,

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[4] 35 U.S.C. § 2(8).
[5] U.S. HOUSE OF REPS. COMM. ON JUDICIARY, Reform of the U.S. Copyright Office (2016), https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf.
[6] *See* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0488+0+DOC+XML+V0//EN.
[7] *Id.*