Supplementary Submission by Free TV Australia

Digital Platforms Inquiry

Australian Competition & Consumer Commission

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1 Executive Summary

Algorithm Transparency

- Algorithm transparency is essential to engaging with the digital platforms on fair terms.
- Algorithms are designed and directed by humans and should not be allowed to be used as tools to circumvent the ordinary rules and laws of engagement that others, including traditional media companies, are required to comply with.
- The current 'black box' nature of the platforms' algorithms means that not only do broadcasters have no bargaining power when engaging with the platforms, but the terms and conditions upon which they are engaging are not known and subject to change without notice.
- The law should recognise that the digital platforms are accountable for their algorithms, and require the terms and conditions of engagement with, and content distribution by, the platforms to be open and transparent.
- This submission sets out the minimum information that should be provided in order to achieve this.

Copyright and takedown notice scheme processes

- Current takedown practices by the platforms are ad hoc and inadequate. This puts our members' brands and reputations, as well as their intellectual property, at risk.
- Current laws do not sufficiently incentivise takedown of damaging or infringing material by the platforms.
- The most effective ways to improve current takedown notice processes would be to:
    - Ensure the platforms are subject to the same legal and regulatory obligations as traditional platforms in relation to fake, damaging, misleading and defamatory material.
    - Amend the authorisation infringement provisions in the Copyright Act to make clear that service providers, including the platforms, are required to take reasonable steps to prevent copyright infringements where it is within their power to do so.
- The safe harbour scheme under the Copyright Act is a specific protection for service providers who do not control the content on their networks and should not be expanded to include the platforms.
- This inquiry should reject any calls for new copyright exceptions which are ill-defined or open-ended and which would undermine existing takedown processes and current copyright protections.
- This inquiry should instead consider ways to strengthen the copyright framework to support Australian content creators.

2 Introduction

Free TV Australia thanks the Australian Competition and Consumer Commission (ACCC) for the opportunity to make this supplementary submission. We would welcome further opportunities to engage as the ACCC moves towards its interim report in December and again when forming final findings by July 2019.

Free TV represents all of Australia's commercial television networks, covering metropolitan, regional and remote areas.

This supplementary submission sets out the industry position on issues that the ACCC has either raised directly with Free TV or that have been raised in consultation forums with industry. It supplements Free TV's substantive submission provided to the ACCC in April as well as individual broadcasters' submissions on these issues.

This submission is broken into 2 key sections:

- **Part A: Algorithm transparency** – The ACCC public consultation forums raised the issue of how to achieve increased transparency of the platforms' algorithms. Part A of this submission sets out the proposed minimum information required to enable broadcasters to engage with the platforms on fair terms.
- **Part B: Takedown notice processes** - The ACCC has asked whether the current system of takedown notices could be improved, with particular reference to the current legislative framework under the Copyright Act. Part B of this submission sets out the current takedown notice practices undertaken by the platforms, the legislative scheme that exists in Australia and the amendments required to improve the existing legislative scheme.

PART A Algorithm Transparency

A.1 Why algorithm transparency is important

As detailed in our original submission to this inquiry, search results (in the case of Google) and news content (in the case of Facebook) are served up on the digital platforms in accordance with algorithms which determine the prominence of the content accessed by consumers.

Algorithms and machine learning are an intrinsic part of the operation of the digital platforms. Google and Facebook's algorithms enable these companies to play a critical role in the distribution of content. They effectively act as gatekeepers for the discoverability of content, including news content online. Google dominates search and Facebook is increasingly becoming an independent distribution channel for news content of its choosing through its NewsFeed. Their algorithms determine the "relevance" of news content, and how much of their audience should be referred to third-party websites.

Broadcasters depend on these algorithms to surface their content and spend a considerable amount of money boosting their content on the platforms. They rely on the platforms for content distribution. At the same time however, there is little or no transparency or understanding in relation to how that distribution occurs.

Despite the significant impact that changes to the algorithms can have on media companies, they are entirely hidden from view. This gives the platforms substantial power to determine a brand's reach and to change it without notice, which has the potential to destroy brand value and force businesses to pay more to achieve reach previously achieved organically.

Critically, the platforms play a key role in distribution of content. However, their search and NewsFeed functions operate under fundamentally different rules to traditional distribution platforms, which usually conduct their businesses in accordance with agreed terms and conditions in a more transparent way.

For example, if you provide a press release to a traditional media company for distribution, the content is delivered to an agreed audience, at an agreed time and for an agreed price. The press release distribution company cannot unilaterally change or reduce the audience it delivers the press release to or change the agreed price of delivery. If it did, the contract would likely be considered unfair at law. In any event in a competitive market, the customer would go elsewhere. While the platforms operate differently to traditional distribution platforms, the primary role they play in providing content to consumers is undeniable. At the moment, the rules that govern how they play this role are completely opaque. This also raises complex ethical issues around equity, security and privacy, and the adequacy of governance over the digital platforms' algorithms.

A recent example of the importance of algorithm transparency to ensuring that media companies understand the terms and conditions of engagement with the platforms can be seen with Google's new paraphrasing algorithm.

Example – Paraphrasing algorithm

Recent news coverage reported that a new 'paraphrasing algorithm' developed by Google extracts substantial parts of web content from webpages and provides a summary of that content. This would attract users to Google's summaries rather than the original content that the copyright owners have invested in creating and paid Google to distribute. It would directly interfere with the rights holder's ability to monetise that content.[1]

[1] For example see Search Engine Journal, *Google's New Algorithm Creates Original Articles From your Content*, https://www.searchenginejournal.com/google-article-

In addition to surreptitiously undermining the value of broadcasters' engagement with the platform, this type of tool clearly raises copyright concerns. It would ordinarily be a breach of copyright for a person to take substantial parts of another person's copyright content for the purposes of monetising it. The fact that Google uses an opaque algorithm to extract the copyright content rather than more direct means, does not negate the copyright issues that arise. The algorithm should not be a tool for circumventing the laws that others, including commercial free-to-air broadcasters, are required to comply with. However, without transparency of the algorithm, the issue is completely hidden from public view.

The digital platforms have a responsibility on their platform, and cannot abdicate this responsibility under the guise of automated algorithms and machine learning. While it is true that the editorial curation and advertising functions are automated by the algorithms in these systems, rules and constraints can be written in at any time to improve governance and the accountability of the algorithms which control the functions of the systems. There is always human intervention that can be exercised over the algorithms to achieve a desired outcome, or to constrain the algorithm. This was evident in the recent changes to the Facebook NewsFeed algorithm to prioritise family and friends content.

The law should recognise that the digital platforms are accountable for their algorithms, and require the terms and conditions of engagement with, and content distribution by, the platforms to be open and transparent. This allows business partners and users understand how decisions are made and can more easily identify potential bias, errors and unintended outcomes.

While broadcasters are not seeking full disclosure of the platforms' algorithms, a minimum amount of information is required to enable broadcasters to understand the rules of engagement with the platforms, the risks to their brands and reputations associated with that engagement, and to make informed decisions about whether to engage or not. We set out our proposals for minimum standards of transparency in relation to the platforms' algorithms below.

A.2 Transparency proposals for both Google and Facebook

The following table sets out our proposals that apply to both Google, including video search results and YouTube, and Facebook including Instagram Algorithms.

Issue	Details that should be disclosed
Explanation of algorithm	Provide explanation of the algorithms, defined clearly and simply, including: • what is content upranked or downranked for; • what practices are merited or demerited; • prioritisation rules for specific types or formats of content; and • which specific factors influence order and appearance within search and feed
Notice of changes to algorithm	Notice of changes to algorithm, along with an agreed minimum notice period (eg. 1 month). For a given algorithm update there could be an official release note to provide more transparency about changes.
Notice of new products	Notice of new products and information about those new products including implementation timelines to allow partners to get their businesses ready.

algorithm/253565/?utm_source=moztop10&utm_medium=email&utm_campaign=moztop10&_hsenc=p2ANqtz-8-SvdNikdndtx8hZ17EMcY4q4PkmtkBD7z6owTbF_u6Avk9DU0kVfjRJGU8CqKi-_tPg4vChz69wjAwBtr2LQ0JJDZIw&_hsmi=63368086

A.3 Transparency proposals specific to Facebook

The following table sets out our proposals that apply to Facebook in relation to its Newsfeed Algorithm and Facebook Watch.

Issue	Details that should be disclosed
Information about prioritisations	Disclose prioritisation rules within the FB algorithm, for example: • Video gets more reach than images – provide an explanation of why • Are there prioritisations of certain types of content • Whether boosting posts impacts ranking
Explanation of engagement	Provide explanation of how engagement of content with fans affects the performance of content
Explanation of ratios	Provide a best practice understanding as to the algorithm and the ratios it applies. For example, a broadcaster may have 2 million followers for a popular program, but if a broadcaster posts a piece of content, what is the expected proportion of those followers that could be expected to connect with that content? Another example is to provide an understanding of how that ratio is affected by community engagement with content.
Explanation of the value of new features within the FB algorithm	Providing an explanation of the value of new features within the algorithms, for example, a broadcaster can opt in to tag its content eg. “breaking news”, “premiere video”. However it is not clear how this tagging affects the performance of its content compared to if the content were to be untagged.

A.4 Transparency proposals specific to Google

The following table sets out our proposals that applies to Google in relation to its search algorithm including video search

Issue	Details that should be disclosed
Information about ranking	Provide further guidance on the factors and features that determine a search ranking. For example: • Are there prioritisations of certain types of content • What effect does “freshness” of content have on the ranking • Confirmation of if/how user engagement (eg. clicking another link) affects rankings • How much of the equity (or value) of a particular piece of content, be that video or text, is passed from that piece of content to other pieces of content from that same brand/network. • How does content length (e.g. length of video) impact search rankings and algorithm prioritisation?
Notification of taking	Google should be required to notify a website/publisher if content is taken for the purpose of being displayed on the search results page (eg. a rich snippet). Websites & publishers should have a right to opt-out of this without it negatively affecting their search ranking.
Disclosure about interoperability	Google should disclose: • whether using other Google products affects ranking eg. Google Cloud, Google Analytics, AMP pages, Google DFP; and • whether spending on Search Engine Marketing impacts ranking.

PART B Improving the takedown notice scheme

B.1 Current takedown practices by the platforms

There is currently no streamlined take-down notice system or procedure in Australia that applies to the platforms and the ad hoc processes that exist or are negotiated between platforms and content owners are inadequate. In fact, the digital platforms are writing their own rules on how to govern the unlawful use of publishers' material and specifically the use of publisher's content and broadcasters' celebrity images.

The existing processes employed by the platforms to resolve copyright issues are determined by the platforms' US parent companies. Both Google and Facebook have tailored their systems to comply with the obligations of the US safe harbour scheme under the *Digital Millennium Copyright Act* (DMCA) and any requests for take-down of infringing material is dealt with by the platforms' US employees on US time.

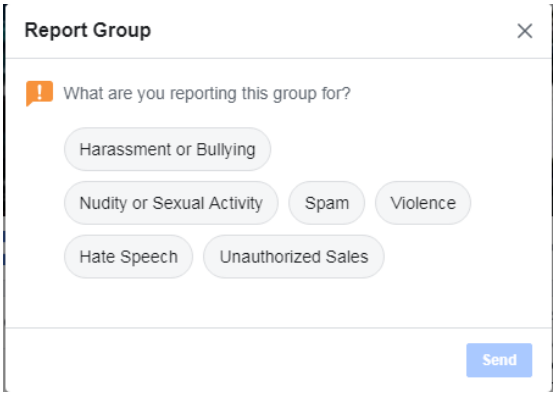
Clicking on Google Australia's website terms refers users to the following statement:

> ### Privacy and Copyright Protection
>
> Google's privacy policies explain how we treat your personal data and protect your privacy when you use our Services. By using our Services, you agree that Google can use such data in accordance with our privacy policies.
>
> We respond to notices of alleged copyright infringement and terminate accounts of repeat infringers according to the process set out in the U.S. Digital Millennium Copyright Act.
>
> We provide information to help copyright holders manage their intellectual property online. If you think somebody is violating your copyrights and want to notify us, you can find information about submitting notices and Google's policy about responding to notices in our Help Center.

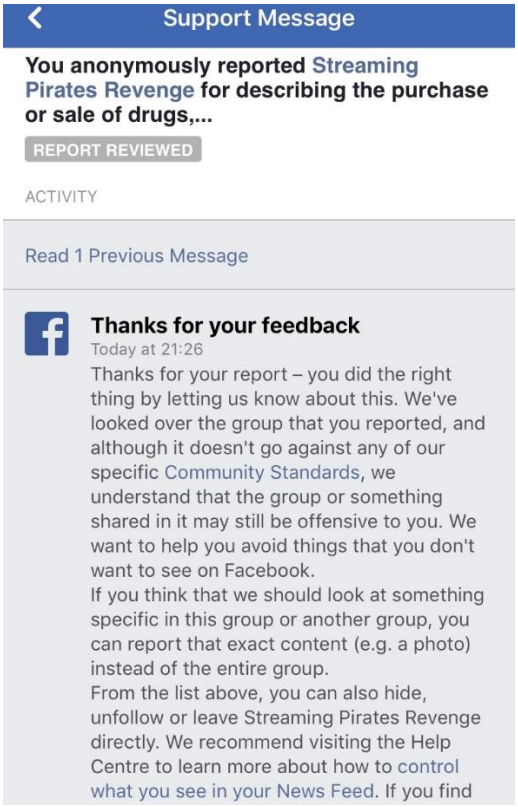
Similarly, Facebook's website refers you to the following:

There also do not appear to be any avenues or processes to report Facebook groups set up to facilitate access to pirated material. There are a number of Facebook groups set up to discuss, share and support access to pirated copyright content.

While Facebook allows you to report a group, it gives you a very narrow range of options for why you can report a group. Reporting a group for copyright infringement is not one of the options:



Upon persisting and clicking on the available options for reporting the group, Facebook eventually responded indicating that it had reviewed the group, 'Streaming Pirates Revenge', and that it "doesn't go against one of our specific Community Standards."



The current processes in place do not adequately allow reporting or removing of infringing material. In practice, the existing processes have resulted in Free TV members reporting a number of issues, including:

- Broadcasters have to invest significant time and resources into monitoring content and engaging with the platforms to have damaging and pirated the content removed.
- The evidentiary burden on proving copyright ownership is often time consuming and onerous (particularly given there is no registration process for copyright ownership in Australia as there is in the US), requiring copies of copyright content to be uploaded to the digital platforms rights management system.
- Even when content is removed, it is not always done expeditiously and often exactly the same content goes up again and again, sometimes by the same users.
- The process of engaging with Google or Facebook staff, accessing their Rights Management Tools and gaining authorisation has taken up to 4 weeks.
- Even with authorised access to the content identification tools, the tools do not identify all infringing broadcasts.
- The content identification tools do not identify infringing broadcasts if there is a dispute on foot about copyright ownership.
- In relation to the use of broadcasters' celebrity images and reputation there is no consistent timeframe in which they are removed and even when they are removed new ads unlawfully using these images appear again under new domains or advertiser accounts.

Current weaknesses in the regulatory framework mean that content owners are forced to engage in ad hoc processes with service providers and with each of the platforms separately. The processes that the platforms have in place have proven to be cumbersome, slow and in many instances ineffective.

B.2 The consequences of ineffective takedown processes

Inadequate takedown processes by the platforms negatively impact broadcasters in two ways:

1. They damage broadcasters' business reputations and brands

2. They devalue our IP by allowing our content to be pirated on their platforms.

The first issue was demonstrated recently by the recent fake ads scam. We provide an example from the Nine network below, however, the Ten network and a number of its hosts including Carrie Bickmore, Lisa Wilkinson and Jessica Rowe have experienced very similar issues.

Nine Example - Facebook

Facebook has hosted fake advertisements imitating a number of the networks' on-air talent, including Today co-host Georgie Gardner, The Block's Shelley Craft, Nine News Sydney presenter Deborah Knight and AFL Footy Show host Eddie McGuire, which mislead consumers into handing over credit card details which are locking unsuspecting consumers into subscription based contracts for products they believed they were purchasing as a one off and because they believe they were endorsed by the celebrity.

This issue was raised by both Nine and the on-air talent directly with Facebook numerous times. Even when the unlawful material is removed, new fake ads surface again quickly. For example, the offending material using images of Shelley Craft reappeared the next day. This places Free TV members in the position of having to monitor offending material and engage with Facebook for its eventual removal.

Most recently, Nine sought takedown of a fake advertisement using Georgie Gardner's image. Nine lodged the takedown request with Facebook on Wednesday September 5, 2018. As at Thursday September 13th the ad had still not been removed. It was not until Nine sent a letter to Facebook raising the broader issue of these ads and using this particular ad as an example that it was finally removed. This meant that the fake ad was advertised on the platform for a further 8 days.

These ads are of great concern to Nine and the individuals affected who have spent many decades building their reputations based on trust and integrity. The celebrities involved have heard directly from viewers that have bought the products on the belief that they are being endorsed by Nine celebrities and based on their trust in that celebrity. Furthermore, after the original purchase they then discover that they are subscription style offerings locking them into monthly payments which have been very difficult for them to extract themselves from.

Nine Example – Google

False advertisements which make unauthorised use of the images of Nine's on-air talent have recently also been appearing throughout the Google Display Network, including alongside Nine branded material.

Free TV understands that Google is remunerated for the publication of these false advertisements, and has the ability to prevent their publication, including through filtering of advertisements and the use of detection algorithms.

Nine has recently written to Google about these fake ads in order to escalate this issue and have it addressed.

These ads directly result in significant damage not only to the reputation of broadcasters' businesses but also the reputation of the presenters involved. The takedown processes employed by the networks in these instances have been inadequate and demonstrated a

reticence by Facebook to deal with the problem. This is evidenced by the fact that the ads kept being reinstated on the platform.

In relation to the second issue, inadequate takedown notice processes devalue broadcasters' intellectual property by allowing their content to be pirated. A number of studies support this and have found that weak copyright frameworks, which can be viewed as tolerant towards piracy, report higher levels of it.[2] Allowing consumers to view pirated content means that those consumers will no longer access the legitimate copy and as a result, the value of the legitimate copy decreases. It also encourages those consumers to continue to access pirated content if there are no negative consequences of doing so. In this way, piracy moves audiences away from legitimate content and effective takedown processes are critical to reducing it.

Free TV members put significant time and resources into making their products and services available legitimately to viewers for free. Australian content is expensive to make; Free TV members invest $1.6 billion every year in creating Australian content. This investment is also critical to ensuring a continuing vibrant and healthy local production sector. Online piracy undermines broadcasters' ability to underwrite this investment.

Despite legal content being readily available for free, Australians continue to use illegal avenues to access television content. Research for the Intellectual Property Awareness Foundation indicates that around 25% of Australian adults and 24% of Australians aged 12-17 illegally download movies and TV shows.[3] A 2015 report commissioned by the Department of Communications and the Arts similarly found that a quarter (26%, equating to approximately 5.2 million people) of Australian internet users aged 12+ consumed at least one item of online content illegally over the first 3 months of 2015. Around a quarter of these (7%) exclusively consumed illegal content.[4]

Effective takedown processes are critical to deterring and therefore reducing digital piracy. The existing copyright framework does not sufficiently do this. To enable broadcasters to continue to invest in Australian content and the local production industry, the copyright framework must be strengthened to ensure that it sufficiently incentivises the removal of pirated content. We expand on this below.

B.3 How to improve takedown notice processes

To improve takedown notice processes, there need to be sufficient incentives in place to remove material which is either damaging to broadcasters' (or their employee's) reputation or brand or which devalues broadcasters' IP by facilitating pirated content. The current regulatory framework does not create sufficient incentives in either case and the above examples demonstrate the damage caused as a result.

Takedown notices can be improved by:

- Ensuring the platforms are subject to the same legal and regulatory requirements as traditional platforms in relation to fake, damaging, misleading or defamatory material; and
- Ensuring that the legal framework incentivises removal of pirated material.

B.3.1 Damaging material/Fake Ads

In relation to fake news advertisements which make unauthorised use of celebrity images and reputation, the platforms should be required to ensure that material which they control is not fake, damaging, misleading or defamatory.

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2 OECD Report, 2015: https://www.oecd.org/sti/ieconomy/Chapter5-KBC2-IP.pdf

3 Based on independent research conducted by Sycamore, for the Intellectual Property Awareness Foundation.

4 See: https://www.communications.gov.au/sites/g/files/net301/f/DeptComms%20Online%20Copyright%20Infringement%20Report%20FINAL%20.pdf

Such requirements exist on all traditional media platforms with swift and serious repercussions for breaches. Commercial free-to-air broadcasters are required to review and classify all advertising on their platform and ensure compliance with the requirements of the Free TV Code of Practice in addition to all legal requirements. The dense regulatory framework that governs free-to-air broadcasting ensures that the platform is a brand-safe environment and that community standards are met.

The platforms should be subject to similar requirements. They should be required to review all material including advertising prior to publication and be subject to legal repercussions if they do not comply. In the case of Fake Ads, now that the digital platforms are aware of this insidious advertising practice on their platform, they must take responsibility to ensure these advertisements are not published.

B.3.2 Removal of pirated material

B.3.2.1 Infringing material must be removed expeditiously

Service providers must be required to take down material expeditiously. What constitutes 'expeditious' in the circumstances will depend on the nature of the content. For example, in relation to live content, removal must be immediate. Waiting until the content stream to millions of viewers has finished is not acceptable. Once a viewer has seen an entire episode of a program illegally, they will no longer be going to the legitimate source for that content and Free TV viewership numbers will fall as a result. There must be a process whereby content owners can contact the relevant platform quickly and have material removed immediately. This would require access to Australian staff with responsibility for dealing with the issue.

B.3.2.2 Termination of access of repeat infringers

Any takedown process must also require the platforms to take reasonable steps to prevent the same material from being uploaded again in the future. Our members have reported instances of the same infringing material being uploaded onto YouTube, sometimes by the same repeat infringers.

If a user has been warned twice to remove infringing material and they persist in the infringing activity, their access should be terminated. While the platforms have policies to terminate the accounts of repeat infringers, our understanding is this is not currently occurring in practice.

B.4 How to incentivise removal of copyright infringing material

For the platforms to remove pirated material expeditiously and to terminate the accounts of repeat infringers, the copyright framework must effectively incentivise this. At the moment, it does not. We expand on the issues with the framework, and the changes required to address them, below.

B.4.1 Authorisation infringement provisions key to effective takedown processes

The incentive for service providers to take down infringing material on their platforms is created from the fact that the Copyright Act makes authorisation infringement illegal. These provisions are designed to incentivise the removal of pirated content online.

In circumstances where service providers have control over infringements on their networks, the authorisation provisions of the Act require service providers to take reasonable steps to prevent or avoid the infringement.[5] In determining whether or not a service provider is liable for authorisation infringement, the Copyright Act requires a court to consider the following:

[5] *Copyright Act 1968*, Sections 36, 101.

- the extent (if any) of the service provider's power to prevent the copyright infringement;
- the nature of any relationship existing between the service provider and the copyright infringer;
- whether the service provider took any reasonable steps to prevent or avoid the infringement, including whether the person complied with any relevant industry codes of practice. [6]

B.4.2 Current authorisation infringement provisions not working

The current authorisation infringement provisions are not working in the online environment as they were intended to. The decision in Roadshow Films v iiNet,[7] highlighted this. In that decision, the Court found that iiNet had no direct technical power to prevent its customers from using the BitTorrent system and that it could not be inferred from iiNet's inactivity after receiving AFACT notices that iiNet had authorised copyright infringement infringements of its subscribers. This was despite the fact that iiNet had the technical power to prevent infringing activities by suspending or terminating user accounts, as well as a contractual relationship with users whereby they agreed not to use iiNet's service to infringe copyright.[8] This decision severely limits the circumstances in which an ISP can be found liable for authorising copyright infringement.

The Government recognised this issue in its discussion paper, '*Online Copyright Infringement*',[9] which proposed to amend the authorisation liability provisions of the Act so that it is clear that they are intended to function the same way in the online environment as they did in the analogue environment. That paper noted:

> "Extending authorisation liability is essential to ensuring the existence of an effective legal framework that encourages industry cooperation and functions as originally intended, and is consistent with Australia's international obligations."[10]

It also noted that Australia is required to ensure that these provisions operate effectively under various international agreements, including under the Australia – US Free Trade Agreement. This was recognised in by the Attorney-General's Department in its 2014 paper, *'Online Copyright Infringement'*:

> *"These provisions are intended to create a legal incentive for service providers such as ISPs to take reasonable steps to prevent or avoid an infringement where they are in a position to do so.*
>
> *"Australia is obliged under its free trade agreements with the United States, Singapore and Korea… to provide a legal incentive to ISPs to cooperate with rights holders to prevent infringement on their systems and networks."*[11]

B.4.3 Authorisation infringement must be strengthened and platforms must be covered

Clear and effective authorisation provisions are fundamental to the operation of the Copyright Act framework as a whole, including the legislative takedown notice process. They ultimately provide the incentive to take infringing material down, by creating a legal obligation to do so. For this reason, they must operate effectively, and they must cover the activities of the platforms.

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6 Ibid, Sections 36(1A)(c), 101 (1A)(c).
7 Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16.
8 Ibid.
9 Commonwealth Attorney-General's Department, *Online Copyright Infringement, Discussion Paper*, July 2014.
10 Ibid, 3.
11 Ibid, 3.

This issue is the single most critical to ensuring more effective takedown practices by the platforms. Where a service provider is aware of an infringement and it is within the power of a service provider to take reasonable steps to prevent that infringement, the service provider should be required to take those steps. This is consistent with the purpose of the authorisation infringement provisions at ss 36 and 101 of the Act.[12]

The authorisation provisions provide for industry codes to be developed in relation to appropriate takedown processes. No such agreed processes are currently in place with the platforms. If they were developed, compliance with any such codes would significantly reduce any risks associated with pirated material online to the benefit of service providers and would make a finding of authorisation infringement unlikely.

B.5 The current legislative safe harbour scheme

The platforms have argued that the safe harbour scheme should be expanded to cover their activities. However, expansion of the safe harbour scheme to cover the platforms would not improve takedown notice processes. It would risk doing the opposite and undermining the effectiveness of any existing processes in place. We set out the nature of the safe harbour scheme and the problems that any expansion would present below.

B.5.1 The safe harbour scheme is a specific protection for service providers who don't control the content on their networks

The current legislative safe harbour scheme in Part V Div 2AA of the Act includes a takedown notice process and is intended to work together with the authorisation infringement provisions to create a further legal incentive for certain service providers to take down copyright infringing material online.[13]

However, the scheme is limited to apply only to service providers and activities of service providers where the service provider **does not control, initiate or direct** copyright infringements on the service provider's network.[14] That is, it is generally limited to network services which merely facilitate the communication of content by users.

This is a key element of the scheme recognised both when the scheme was first introduced in 2006 for Carriage Service Providers (CSPs),[15] and when it was expanded to include Designated Service Providers (DSPs) in 2018.[16]

It does not cover service providers or activities where service providers actively participate in or have control over infringements. Service providers who are in the business of providing content services generally **do** control the content on their networks and are therefore appropriately excluded from the scheme.

In circumstances where service providers have control over infringements on their networks, the authorisation provisions of the Copyright Act (described above) require service providers to take reasonable steps to prevent or avoid the infringement.[17]

B.5.2 Expanding the safe harbour scheme would undermine its policy objectives

Expanding the existing safe harbour scheme to the digital platforms would undermine the scheme's policy objectives: to incentivise service providers and copyright owners to work

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12 *Copyright Amendment (Digital Agenda) Bill 1999*, Explanatory Memorandum, 1998-99.

13 See for example http://apo.org.au/system/files/40630/apo-nid40630-71931.pdf; https://www.ag.gov.au/Consultations/Documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme.pdf

14 Attorney-General's Department, *Consultation Paper, Revising the Copyright Safe Harbour Scheme*, 2014, 3.

15 *Telecommunications Act 1997*, Definitions.

16 See the *Copyright Amendment (Services Providers) Bill 2017*. DSPs including educational and cultural institutions and institutions assisting people with disabilities.

17 *Copyright Act 1968*, Sections 36, 101.

together to minimise online piracy. By weakening copyright protections further, it would promote rather than deter piracy.

This is because expanding the scheme to the platforms would protect service providers from legal remedies available to rights-holders for copyright infringement, regardless of whether they:

- contributed to that infringement; or
- took reasonable steps available to them to remove pirated material from their networks.

By removing the legal risks associated with such infringing material, it would disincentivise the platforms from removing it. This is particularly the case in circumstances where a) the legal framework does not provide any concrete obligations on service providers to remove infringing material and b) the platforms are commercially benefiting from the material.

To operate effectively, the safe harbour must continue to apply only to service providers' activities where they do not actively make infringing content available or have the ability to control the infringements of their users.

Activities that involve actively participating in making infringing content available must remain clearly excluded from the scheme. These include:

- providing or selecting infringing content for a use;
- recommending infringing content based on an algorithm; and
- commercially gaining from making infringing content available.

In these circumstances, platforms are either directly participating in the infringement, or in the case of infringing activities which generate revenue for the platforms, there is a direct conflict between complying with the law by taking down infringing material and maximising hits and revenues.

B.5.3 It is not necessary to expand the safe harbour scheme to include the platforms

As outlined above, the safe harbour scheme is a very specific protection which is not directed to the platforms. As businesses that monetise content, the key activities of the platforms enable them to control, initiate or direct infringing activities. Therefore, they would not and should not be eligible for the safe harbour in respect of their core business activities which they control.

In addition, it is unclear why it is necessary to expand the safe harbour scheme to the platforms. It may be that there are other activities which occur on the platforms which they do not control, for example the posting of user generated content. However, if they comply with the authorisation infringement provisions and any industry codes developed under those provisions of the Act, the platforms would be unlikely to be found responsible for copyright breaches on their platform (regardless of whether they control those breaches or not). Therefore, the need to access the copyright safe harbour scheme would not arise.

B.6 Safe harbour for passive activities and service providers

This submission has outlined why it is both inappropriate and unnecessary to provide the platforms access to the safe harbour scheme. It is also worth noting however that the existing safe harbour scheme does not sufficiently incentivise those service providers that do have access to it in relation to passive activities, to work together with rights holders to expeditiously take down infringing copyright material. In particular:

- the requirements on CSPs to 'opt-in' to the scheme are very minimal and outdated. A number of the conditions in Section 116AH of the Copyright Act depend on the existence of an industry code. The contemplated code is described in regulation 20B of the Copyright

Regulations as including technical measures to be used to "protect and identify copyright material". No such code has been developed and, accordingly, carriers and CSPs have not put any such technical measures in place.

- There is no obligation to take positive steps to remediate identify and eliminate infringing material. The framework should impose on carriers and CSPs, as a condition of the safe harbour, an obligation to 'do the carrier's best or the provider's best to prevent telecommunications networks and facilities from being used in, or in relation to, the infringement of copyright" including "to give copyright owners such help as is reasonably necessary for the purpose of identifying, preventing the transmission of and removing from storage, copyright infringing material.

To better incentivise service providers who do have access to the scheme to expeditiously remove pirated material on their networks, the safe harbour should impose positive obligations on those service providers to do so.

B.7 Copyright exceptions must not interfere with takedown notice scheme

During the ACCC's forum, a representative of the platforms raised the issue of expanding the existing copyright exceptions under the Copyright Act to include a broad exception for 'incidental and technical use'. The platforms have also lobbied for a broad 'fair use' exception in the *Copyright Modernisation Review* process currently being conducted by the Department of Communications and the Arts.[18] Free TV strongly opposes any new open-ended copyright exceptions including fair use and fair dealing for incidental and technical use.

In addition to potentially allowing a wide range of uses that would interfere with the copyright owners market, such exceptions would interfere with the operation of the safe harbour scheme.

The safe harbour imposes a number of obligations on qualifying service providers before they can access, and have the benefit of, the safe harbour in respect of a range of 'technical' activities. It is not logical for exemptions to be granted for activities that are subject to the safe harbour scheme. This would simply undermine the operation of the scheme.

As we have outlined in our submission to the Copyright Modernisation Review,[19] before any new copyright exceptions are granted, it must be made clear:

- What such an exception would cover;
- Why such an exception is required; and
- How it differs from the existing temporary reproduction exceptions in the Act.

This is consistent with the existing prescriptive approach to granting new copyright exceptions which requires that exceptions be well-defined so that their impact on rights-holders can be properly assessed.

The exception for incidental and technical use proposed by the platforms has not been defined and is potentially extremely broad. The extent to which such an exception impacts on rights holders is therefore completely unclear.

The recent stakeholder roundtable conducted by the Department of Communications and the Arts canvassed that such an exception could cover a range of uses including caching, crawling, scraping, searching, snippets, storing data and data and text analysis.[20] These are

[18] Department of Communications and the Arts, Copyright Modernisation Review. See https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation

[19] Free TV Submission, Copyright Modernisation Review, 2018.

[20] Copyright Modernisation Review, Roundtable on Incidental and technical use, 2018.

an extremely broad range of uses which could directly interfere with the copyright owner's market in a number of ways, for example:

- It could cover the use of 'snippets' by search engines. These can be valuable to copyright owners. Snippets on a search page can contain valuable copyright information and if internet users can obtain that information from a search without having to go to the copyright owner's website, this directly interferes with the rights holder's ability to monetise that content. Free TV notes that a draft copyright ruling endorsed by the European Union last week recognised this and proposed to require Google, Microsoft Bing and other search engines to pay publishers for serving up snippets from the content on their sites in search engine query results.[21]
- It could cover uses of copyright material in accordance with the recently reported new 'paraphrasing algorithm' developed by Google. According to reports, the new algorithm extracts substantial parts of web content from webpages and provides a summary of that content. This would attract users to its summaries rather than the original content, again directly interfering with the rights holder's ability to monetise that content.[22]
- Scraping and data analysis - Related to the use of snippets, the exception as framed could also cover the act of scraping commercially valuable content by web crawlers, copying and storing that content, and making it available through the search engine's search results. These activities directly impact on click-through rates to the same content on broadcasters' websites, which in turn reduces broadcasters' ability to monetise the content they have invested in, and results in it being devalued. For example, Google scrapes sports results from websites and presents them as featured snippets, reducing what was a significant source of referrals for news sites.

Free TV notes that the EU is currently considering making the platforms legally liable for copyrighted material including by:

- Requiring them to police and prevent the uploading of infringing copyrighted content. This could be done by filters that check content for example.
- requiring them to pay for showing snippets of news articles and linking to content owners' intellectual property.[23]

The ACCC should consider similar forms to strengthen copyright protection and support Australian content creation.

21 https://www.mediapost.com/publications/article/319851/european-union-ambassadors-endorse-search-engine-s.html

22 https://www.searchenginejournal.com/google-article-algorithm/253565/?utm_source=moztop10&utm_medium=email&utm_campaign=moztop10&_hsenc=p2ANqtz-8-SvdNikdndtx8hZ17EMcY4q4PkmtkBD7z6owTbF_u6Avk9DU0kVfjRJGU8CqKi-_tPg4vChz69wjAwBtr2LQ0JJDZIw&_hsmi=63368086

23 https://www.theaustralian.com.au/business/media/digital/artists-newspapers-rail-against-tech-giants-in-eu-copyright-war/news-story/533ce2a4d12cc0f315ad7d4022197962; https://www.cnet.com/news/article-13-europes-hotly-debated-eu-copyright-law-explained/