

Chapter 1

Introduction

1.1 On 26 March 2015, the Hon Malcolm Turnbull MP, Minister for Communications, introduced the Copyright Amendment (Online Infringement) Bill 2015 (the Bill) into the House of Representatives.¹

1.2 On the same day, pursuant to a report of the Senate Standing Committee for Selection of Bills, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 13 May 2015.² On 12 May 2015, the Senate granted an extension of time for reporting until 29 May 2015.³ On 29 May 2015, in its interim report, the committee advised the Senate that it intended to present its final report by 9 June 2015.⁴ On 9 June 2015, in a second interim report, the committee advised the Senate that it intended to present its final report by 11 June 2015.⁵

Conduct of the inquiry

1.3 In accordance with usual practice the committee wrote to a number of persons and organisations, inviting submissions to the inquiry by 16 April 2015. Details of the inquiry were also made available through the committee's website at http://www.aph.gov.au/senate_legalcon.

1.4 The committee received 49 submissions in response to this inquiry. The submissions are listed at Appendix 1 to this report and are available on the committee's webpage. The committee held a single-day public hearing for its inquiry on 1 May 2015. The names of witnesses who attended the hearing are listed in Appendix 2. The committee would like to thank all those who submitted, gave evidence and assisted with its inquiry.

Background to the Bill

1.5 On 30 July 2014, the Attorney-General, Senator the Hon George Brandis QC, and Mr Turnbull jointly released a discussion paper on the establishment of a legal framework to address online copyright infringement (discussion paper). The ministers emphasised the importance of the role of interested industries in this area, saying that:

1 *Votes and Proceedings*, No. 111, 26 March 2015, p. 1248.

2 *Journals of the Senate*, No. 90, 26 March 2015, p. 2458.

3 *Journals of the Senate*, No. 92, 12 May 2015, p. 2555.

4 Senate Legal and Constitutional Affairs Legislation Committee, *Interim report for the inquiry into the Copyright Amendment (Online Infringement) Bill 2015 [Provisions]*, 26 May 2015, p. 1.

5 Senate Legal and Constitutional Affairs Legislation Committee, *Interim report for the inquiry into the Copyright Amendment (Online Infringement) Bill 2015 [Provisions]*, 9 June 2015, p. 1.

...in the dynamic environment of the digital economy, the Government believes that workable approaches to tackling online copyright infringement are most likely to come from the market. The role of the Government in this context is to provide a legal framework that facilitates industry cooperation.⁶

1.6 The government's consultation process received more than 100 submissions. Mr Turnbull advised Parliament that these submissions were taken into account in the drafting of the Bill. For example, as a result of the consultations, the proposed legislative scheme 'was modified to give more flexibility to courts in determining whether to order an injunction to capture future infringing technologies and to provide more safeguards for carriage service providers, operators, online locations and internet users'.⁷ Mr Turnbull stated that similar provisions have been 'working well in other parts of the world such as the United Kingdom, Ireland and Singapore'.⁸

Purpose of the Bill

1.7 The Explanatory Memorandum to the Bill notes that:

The purpose of this Bill is to introduce a key reform to reduce online copyright infringement. The scheme is deliberately prescriptive; it is intended as a precise response to a specific concern raised by copyright owners.⁹

1.8 The Bill would provide for a copyright owner to apply to the Federal Court of Australia (Court) for an injunction requiring carriage service providers (CSPs) to block access to foreign websites which have the primary purpose of infringing, or facilitating the infringement, of copyright. In doing so the Bill:

...acknowledges the difficulties in taking direct enforcement action against entities operating outside Australia. The proposed amendments are intended to create a no-fault remedy against CSPs where they are in a position to address copyright infringement.¹⁰

1.9 In his Second Reading Speech to the House of Representatives on the Bill, Mr Turnbull stated that:

Copyright protection provides an essential mechanism for ensuring the viability and success of creative industries by providing an incentive for and a reward to creators...in combating online copyright infringement the most powerful weapon that rights holders have is to provide access to their content in a timely and affordable way. The government accepts that this is an important element in any package of measures to address online

6 Australian Government, *Online Copyright Infringement Discussion Paper*, July 2014, Ministers' covering letter.

7 The Hon Malcolm Turnbull MP, *House of Representatives Hansard*, 26 March 2015, p. 3593.

8 The Hon Malcolm Turnbull MP, *House of Representatives Hansard*, 26 March 2015, p. 3592.

9 Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, p. 2.

10 Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, pp 2–3.

copyright infringement...The bill complements these objectives by ensuring there is fair protection of the rights of content creators while balancing other competing interests in the online environment. This will be achieved by ensuring copyright holders have access to an effective remedy without unduly burdening carriage service providers or unnecessarily regulating the behaviour of consumers.¹¹

Key provisions of the Bill

1.10 The Bill proposes amendments to the *Copyright Act 1968* (Cth) (the Act). The substantive amendments to the Act are set out in Schedule 1 to the Bill. The key amendment would be the insertion of a new section 115A into the Act.

1.11 Proposed subsection 115A(1) would provide that the Federal Court of Australia may, on application by the owner of a copyright, grant an injunction (under proposed subsection 115A(2)) which would require a CSP to take reasonable steps to disable access to a specified online location.

1.12 The Court would be empowered to grant such an injunction if it were satisfied that:

- (a) the CSP provides access to an online location outside Australia;
- (b) the online location infringes, or facilitates an infringement of, the copyright; and
- (c) the primary purpose of the online location is to infringe or facilitate the infringement of copyright (whether or not in Australia).

1.13 Item 2 of Schedule 1 to the Bill would ensure that exclusive licensees would enjoy the same rights as copyright owners to bring an action under proposed section 115A. The same provision would also provide that where concurrent rights exist, all joint owners and/or licensees would need to be added to any relevant proceedings.

1.14 Proposed subsection 115A(5) sets out the criteria that the Court would need to take into account in a determination of whether to grant an injunction. This would include:

- the flagrancy of the infringement or facilitation of infringement of copyright;
- whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;
- whether the owner or operator of the online location 'demonstrates a disregard for copyright generally';
- whether access to the online location has been disabled by court orders of other countries or territories on copyright infringement or related grounds;
- whether disabling access to the online location is a proportionate response in the circumstances;

11 The Hon Malcolm Turnbull MP, *House of Representatives Hansard*, 26 March 2015, p. 3591.

- the likely impact of granting the injunction on any person or class of persons;
- whether it is in the public interest to disable access to the online location;
- whether the copyright owner has given the notifications required under subsection 115A(4) (see below); and
- any other remedies available under the Act, other matters prescribed by regulations under the Act, or any other relevant matter.

1.15 The parties to the relevant action would be the copyright owner and the CSP under proposed subsection 115A(3). The person who operates the online location would also be a party, but only if that person were to make an application to be joined as a party to the proceedings.

1.16 Proposed subsection 115A(4) would require the copyright owner to notify the CSP and the person who operates the online location that an application was made. However, the Court could dispense with the requirement to notify the online operator if the Court were satisfied that the copyright owner made reasonable efforts to notify the operator but was unable to contact the operator or to determine the operator's identity or address.

1.17 Proposed subsection 115A(7) would empower the Court to limit the duration of an injunction, or upon application, to rescind or vary an injunction. Proposed subsection 115A(8) would provide that an application to rescind or vary an injunction could be made by the copyright owner, the CSP, the operator of the online location, or any other person prescribed by regulations.

1.18 Finally, proposed subsection 115A(9) would provide that the CSP would not be liable for any costs of court proceedings unless it chose to appear and take part in the proceedings.