

# Chapter 1

## Introduction

1.1 On 13 November 2018, the Senate referred the provisions of the Copyright Amendment (Online Infringement) Bill 2018 (the bill) to the Senate Environment and Communications Legislation Committee (the committee) for inquiry and report by 26 November 2018.<sup>1</sup>

### Conduct of the inquiry

1.2 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant individuals and organisations inviting submissions. The date for receipt of submissions was 20 November 2018. The committee did not hold a public hearing for the inquiry.

1.3 The committee received 26 submissions, which are listed at Appendix 1. The public submissions are available on the committee's website at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/OnlineInfringementBill](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/OnlineInfringementBill).

1.4 The committee thanks all of the individuals and organisations that contributed to the inquiry.

### Scope and structure of the report

1.5 This report comprises two chapters. The remaining sections of this chapter discuss the purpose of the bill, background to the bill and reports by other committees. Chapter 2 outlines the principle issues raised in evidence and presents the committee's views and recommendations.

### Purpose of the bill

1.6 The bill seeks to expand the scope of the injunctive regime in section 115A of the *Copyright Act 1968* (Copyright Act). That section is aimed at blocking access by users in Australia to overseas online locations that facilitate large-scale infringement of copyright.

1.7 Section 115A currently permits copyright owners to apply to the Federal Court for an injunction requiring a carriage service provider to disable access to an online location outside Australia that has the primary purpose of infringing, or facilitating the infringement, of copyright.<sup>2</sup> The amendments in the bill seek to:

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1 *Journals of the Senate*, No. 127—13 November 2018, p. 4084.

2 Explanatory memorandum, p. 3.

- provide that a copyright owner may apply to the Federal Court for an injunction in respect of an online location that has the primary purpose, or the primary effect, of infringing, or facilitating an infringement, of copyright (whether or not in Australia);
- include a rebuttable presumption that an online location is outside Australia, to reduce the evidentiary burden on copyright owners;
- enable copyright owners to seek injunctions requiring online search engine providers to take such steps as the Federal Court considers reasonable not to provide search results that refer users to blocked online locations;
- clarify that the Federal Court may grant injunctions in terms that allow:
  - the copyright owner and carriage service provider, by agreement, to apply an injunction to block other domain names, URLs and IP addresses that start to provide access to the online location after the injunction is made;
  - the copyright owner and online search engine provider, by agreement, to apply the injunction to not provide search engine results that include domain names, URLs and IP addresses that start to provide access to the online location after the injunction is made; and
- enable the minister, by legislative instrument, to declare that particular online search engine providers, or classes of online search engine providers, be exempt from the scheme.<sup>3</sup>

1.8 In his Second Reading Speech to the House of Representatives on the bill, the Minister for Families and Social Services, the Hon Paul Fletcher, stated that:

In February this year, the Government reviewed the existing scheme to determine whether it was operating effectively. In general, this assessment found that the scheme is working well, and that blocking arrangements have been implemented by carriage service providers with minimal disruption. However, there are some clear pressure points.

First, search engines enable users to discover the existence of blocked websites and provide alternative pathways to get to those sites. Second, the types of online piracy have also become broader, with increased use of sophisticated online locations, such as 'cyberlockers', that allow mass file-sharing. Third, new pathways to the blocked sites appear after the initial blocking, and these new pathways can't be blocked because they are not part of the original order. Finally, it can be difficult and costly to determine whether an online location is, in fact, located overseas.<sup>4</sup>

1.9 The minister stated that the measures in the bill directly address these concerns, adding that none of the measures will impede or affect the capacity for

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3 Explanatory memorandum, p. 2.

4 The Hon Paul Fletcher MP, *House of Representatives Hansard*, 18 October 2018, p. 3.

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carriage service providers or search engine providers to voluntarily block or remove links to copyright infringing locations.<sup>5</sup> The minister concluded that:

...the Government is seeking quick passage of this Bill so that Australia's creative industries can take action to protect their rights. These industries have put in place voluntary measures to make content more accessible and cheaper, and run education campaigns so that Australians are aware of the impact of piracy. It is now appropriate for the Parliament to support these efforts by reforming our copyright website blocking scheme to ensure it is fit-for-purpose in a contemporary digital media environment.<sup>6</sup>

## Background to the bill

1.10 The Copyright Act creates exclusive intellectual property rights for owners, including rights to copy, adapt, publish, communicate to the public and publicly perform protected material. Works protected under the Copyright Act include literary, artistic and musical works, as well as film and sound recordings. The Copyright Act also contains a number of remedies through which copyright owners can enforce their rights.<sup>7</sup> These have proven effective in addressing copyright infringement in Australia.

1.11 However, while copyright owners are easily able to take action against domestic sites, a number of foreign-based websites have emerged to provide access to copyrighted material. This has created difficulties for Australian copyright holders seeking to enforce their rights.<sup>8</sup> In his second reading speech for the bill, the Minister for Families and Social Services, the Hon Paul Fletcher MP, noted in this regard that:

...the internet continues to create major challenges for Australia's creative industries. Online copyright infringement reduces the livelihood of Australian creators and investors, and foreign-based websites continue to illegally distribute the content of Australian copyright owners. The operators of these sites are often difficult or impossible to find, and are located in countries that do not have strong copyright laws.<sup>9</sup>

1.12 Difficulties associated with enforcing copyright against foreign-based websites were identified some years ago and, in response, the Government enacted the *Copyright Amendment (Online Infringement) Act 2015* (2015 Act). The 2015 Act inserted section 115A into the Copyright Act. That section permits a copyright owner to apply to the Federal Court of Australia (Federal Court) for an order requiring a

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5 The Hon Paul Fletcher MP, *House of Representatives Hansard*, 18 October 2018, p. 3.

6 The Hon Paul Fletcher MP, *House of Representatives Hansard*, 18 October 2018, p. 4.

7 For example, section 115 of the Copyright Act provides that a copyright owner may seek an injunction, damages or an account of profits.

8 Department of Communications and the Arts, *Regulation Impact Statement: Copyright Amendment (Online Infringement) Bill 2018* (October 2018), p. 4.

9 The Hon Paul Fletcher MP, *House of Representatives Hansard*, 18 October 2018, p. 3.

carriage service provider to block access to an online location outside of Australia that has the 'primary purpose' of infringing, or facilitating the infringement of, copyright.

1.13 The Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Copyright Amendment (Online Infringement) Bill 2015 recommended that the Government conduct an effectiveness review, to be completed two years after its enactment.<sup>10</sup> The Government agreed that a review should be conducted.<sup>11</sup>

### ***Consultation process***

1.14 The Department of Communications and the Arts (the department) conducted a review of section 115A of the Copyright Act in February of 2018. The department received 22 submissions, mostly from representatives of copyright owners, internet service providers, technology sector firms and digital rights groups.<sup>12</sup> Most stakeholder submissions agreed that section 115A has been a positive government initiative which is largely working as intended.

1.15 However, submitters noted that section 115A could be improved in a number of ways. For example, the joint submission from the Australian Film & TV Bodies recommended extending section 115A to other 'intermediary service providers' that facilitate access to content.<sup>13</sup> A number of submitters also raised concerns that section 115A is currently limited to online locations outside Australia, and about the process to obtain extended orders to block new domain names, URLs and IP addresses.

1.16 The department concluded that while section 115A was achieving most of its aims, there was scope to consider improvements to address gaps in the scheme that enabled Australians to access overseas locations that infringe or facilitate the infringement of copyright.<sup>14</sup>

## **Reports of other committees**

### ***Senate Standing Committee for the Scrutiny of Bills***

1.17 When examining a bill or draft bill, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills). The Scrutiny of Bills Committee assesses legislative

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10 Senate Legal and Constitutional Affairs Legislation Committee, *Copyright Amendment (Online Infringement) Bill 2015 [Provisions]*, 11 June 2015, p. 32.

11 The Hon Malcolm Turnbull MP, *House of Representatives Hansard*, 16 June 2015, p. 6416.

12 See <https://www.communications.gov.au/have-your-say/review-copyright-online-infringement-amendment>.

13 Australian Film & TV Bodies, Submission to Department of Communications and the Arts, *Review of the Copyright Online Infringement Amendment*, 23 March 2018, pp. 18-19.

14 Department of Communications and the Arts, *Regulation Impact Statement: Copyright Amendment (Online Infringement) Bill 2018* (October 2018), p. 6.

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proposals against a set of standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

1.18 In its *Scrutiny Digest No. 13 of 2018*, the Scrutiny of Bills Committee expressed concern that the bill would permit the minister to declare, by legislative instrument, that a particular online search engine provider or class of providers must not be specified in an application for an injunction, or an application to vary an injunction. The Scrutiny of Bills Committee emphasised that significant matters, such as the specification of providers that are to be exempted from an injunctive scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The Scrutiny of Bills Committee also emphasised that the proposed power is very broad, in that it would permit the minister to exclude *any* online location from the operation of the injunctive scheme.<sup>15</sup>

1.19 The Scrutiny of Bills Committee requested the minister's advice as to why it is necessary to enable delegated legislation to exempt online search engine providers from the copyright injunctive scheme, and the appropriateness of amending the bill to as to specifically exclude certain classes of smaller providers.<sup>16</sup>

### ***Parliamentary Joint Committee on Human Rights***

1.20 At the time of this report, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) had not commented on the bill. It is expected that the Human Rights Committee's *Report 12 of 2018* will table on 27 November 2018.

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15 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 13 of 2018* (14 November 2018), pp. 6-7.

16 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 13 of 2018* (14 November 2018), p. 7.

