

Chapter 1

Introduction

1.1 On 7 December 2017, the Senate referred the Copyright Amendment (Service Providers) Bill 2017 (the bill) to the Environment and Communications Legislation Committee for inquiry and report by 19 March 2018.¹

Conduct of the inquiry

1.2 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant organisations and individuals inviting submissions. The date of receipt of submissions was 30 January 2018.

1.3 The committee received 38 submissions, which are listed at Appendix 1. The public submissions are available on the committee's website at www.aph.gov.au/senate/ec.

1.4 The committee held a public hearing in Melbourne on 6 March 2018. A list of witnesses who gave evidence at the public hearing is available at Appendix 2. The Hansard transcript may be accessed through the committee's website.

1.5 The committee thanks the individuals and organisations that contributed to the inquiry.

Scope and structure of the report

1.6 This report comprises two chapters. The remaining sections of this chapter discuss the purpose of the bill, the background to the bill and the Scrutiny of Bills Committee review of the bill. Chapter 2 outlines the principal issues raised in evidence and provides the committee's findings and recommendation.

Purpose of the bill

1.7 The bill seeks to extend the operation of the 'safe harbour scheme'² set out in Division 2AA of Part V of the *Copyright Act 1968* (the Copyright Act) to a broader range of 'service providers'. Proposed section 116ABA will extend the safe harbour scheme to include, in addition to a carriage service provider:

1 *Journals of the Senate* No. 79, 7 December 2017, pp. 2513–14.

2 The term 'safe harbour scheme' refers to a provision in a statute that allows for conduct that would otherwise incur a liability or penalty to be deemed, subject to prescribed conditions, not to violate the law. The 'safe harbour', subject to conditions, acts as a protection and therefore encourages conduct that promotes beneficial outcomes. See also, Australian Digital Alliance, *Submission 34*, pp. 3–4.

- educational institutions, through their administering bodies, including universities, schools, technical colleges, training bodies and pre-schools;
- libraries that either make their collection available to the public or are Parliamentary libraries, through their administering bodies;
- archives, through their administering bodies, including the National Archives of Australia and specified state archives, galleries and museums;
- key cultural institutions, through their administering bodies, including specific archives and libraries that are not open to the public; and
- organisations assisting persons with a disability.³

1.8 In the second reading speech on the bill, the minister stated:

Extension of the safe harbour scheme to service providers in these sectors will provide greater certainty to educational and cultural institutions and to those organisations assisting people with a disability about their responsibilities in engaging in the online space.⁴

1.9 The minister added that users of these institutions and organisations' services will also have additional protection under the safe harbour scheme. In addition, the minister stated that 'the Government has made the decision to make this incremental expansion of the safe harbour scheme, so that it can continue to consult on how best to reform the scheme to apply to other online service providers in the future'.⁵ The minister concluded:

The Government will continue to work with stakeholders to find a way to further extend the safe harbour scheme in a way that allows Australian businesses to harness the significant opportunities of the growing digital economy while ensuring respect for the creative efforts and economic rights of creators. The Government is confident that through this staged approach it can find a way to provide a practical and responsive safe harbour framework that operates effectively in the Australian environment.⁶

Background to the bill

1.10 Following Australia's entry into the Australia-United States Free Trade Agreement in 2005, a new regime for determining when carriage service providers (CSPs) might be liable for copyright infringements by users over the CSP's network or services was established. The scheme was based on the 'safe harbour' concept. The following overview of the scheme was provided by the minister in his second reading speech on this bill:

3 Explanatory Memorandum (EM), p. 6.

4 Second Reading Speech, *Senate Hansard*, 6 December 2017, p. 9904.

5 Second Reading Speech, *Senate Hansard*, 6 December 2017, p. 9905.

6 Second Reading Speech, *Senate Hansard*, 6 December 2017, p. 9906.

The scheme in the Australia-United States Free Trade Agreement was intended to provide an alternative to court proceedings for copyright owners where their infringing material is hosted, cached or linked to by a service provider or where a provider's network services are used to infringe copyright. It sets out conditions that a service provider must comply with, including in some situations, taking down infringing material or removing links to infringing material when they have been notified of a suspected infringement by a copyright owner. When the scheme was originally implemented in Australia, it was restricted only to carriage service providers—or providers of telecommunications services (such as Internet Service Providers) as they are more commonly known. This cautious approach was taken because the Internet was still in its infancy.⁷

1.11 The Copyright Act defines a 'carriage service provider' by reference to the *Telecommunications Act 1997*: a 'carriage service provider' is a person who uses a network unit to supply carriage services to the public. This includes telecommunications companies such as Telstra, Optus and TPG.⁸

1.12 The safe harbour scheme protections are confined to certain categories of activities that may be provided by a CSP:

- Category A – acting as a conduit for internet activities by providing facilities or services for transmitting, routing or providing connections for copyright material.⁹
- Category B – caching through an automatic process.¹⁰ Caching is defined as the reproduction of copyright material on a system or network controlled or operated by a CSP in response to an action by a user in order to facilitate efficient access to that material by that user or other users.¹¹
- Category C – storing copyright material on their systems or networks.¹²
- Category D – referring users to an online location (linking).¹³

1.13 To obtain the benefit of the safe harbour protections from liability, the CSP must comply with certain conditions in relation to each category of activity, which in some situations requires the taking down or removal of the copyright infringing material, or removing links to infringing material when the CSP has been notified of a

7 Second Reading Speech, *Senate Hansard*, 6 December 2017, p. 9904.

8 EM, p. 6.

9 *Copyright Act 1968*, s. 116AC.

10 *Copyright Act 1968*, s. 116AD.

11 *Copyright Act 1968*, s. 116AB.

12 *Copyright Act 1968*, s. 116AE.

13 *Copyright Act 1968*, s. 116AF.

suspected infringement by a copyright owner (generally referred to as 'notice to take down' procedures).¹⁴

1.14 Critically, a CSP is only entitled to the protection of the safe harbour scheme if it provides services to the public:

Entities providing services that fall within the four categories prescribed, cannot take advantage of the safe harbour scheme unless they provide network access 'to the public'. A range of organisations and businesses operate services to provide internet access to their clients, customers, students and other users, but not 'to the public'. These entities fall within the Category A activity, but they are excluded from the definition of [CSP].¹⁵

1.15 Music Rights Australia (MRA) commented that:

...safe harbours were not intended to shield ISPs from liability where they themselves engaged in distribution of copyright material or where they intervene or participate in the communication and making available copyright content. They were meant to ensure that innovation was not thwarted by the fear of copyright liability in certain cases where technologies or services were used by third parties.¹⁶

1.16 By contrast, the term 'service provider' in the United States safe harbour scheme is more broadly defined than the term understood in Australian law. In the United States:

...the courts have determined that, for the purposes of the US scheme, the term 'service provider' includes an internet service provider acting as a conduit for peer-to-peer file sharing programs, providers of the software and operators for instant messaging services, internet service providers that provide subscribers with news groups and online vendors. This extends the application of the scheme beyond entities responsible merely for providing the infrastructure for the internet.¹⁷

Scrutiny of Bills Committee

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. The Scrutiny of Bills Committee assesses legislative proposals against a set of

14 *Copyright Act 1968*, s. 116AH.

15 Attorney General's Department, Consultation Paper, *Revising the Scope of the Copyright 'Safe Harbour Scheme'*, October 2011, p. 3.
<https://www.ag.gov.au/Consultations/Documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme.pdf>, (accessed 14 February 2018).

16 Music Rights Australia, *Submission 36*, Attachment 1, Exposure draft submission, p. 5.

17 Attorney General's Department, Consultation Paper, *Revising the Scope of the Copyright 'Safe Harbour Scheme'*, October 2011, p. 4 (citations omitted).

accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

1.18 The Scrutiny Committee examined the bill in its *Scrutiny Digest*, No. 1 of 2018, and made no comments on the bill.¹⁸

18 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 1 of 2018, 7 February 2018, p. 16.

