

Chapter 2

Key issues

2.1 This chapter examines the principal issues raised by stakeholders. The committee's overall conclusions on Copyright Amendment (Service Providers) Bill 2017 (the bill) are provided at the end of the chapter.

Stakeholder views on the limited extension of the safe harbour scheme

2.2 The principal issue raised in submissions is whether the protections of the safe harbour scheme should be extended beyond the definition of 'service provider' proposed by the bill to all online service providers. The following discussion provides an overview of the arguments provided by stakeholders.

Support for the limited extension as proposed in the bill

2.3 Many submitters representing the rights of copyright holders supported the proposed limited extension of the safe harbour scheme as envisaged by the bill. Music Rights Australia (MRA), for example, stated:

We are pleased to support the bill because the government has chosen to approach the amendments through the first-principle lens. They have created new, discrete classes of service providers which include those educational institutions I mentioned before and also cultural institutions and organisations which support people with disabilities. The music community supports this innovative and fit-for-purpose solution.¹

2.4 Submitters provided a range of reasons for this support. First, it was argued that the proposed amendments continue to reflect the original policy intent for the introduction of the safe harbour scheme, that is, 'to reserve eligibility for safe harbour protections to only those activities that are primarily passive, technical and automatic in nature'.² The Australian Copyright Council added:

It is very clear from the material surrounding the introduction of the safe harbour regime in the US and Australia that the principle behind the provisions is that passive carriers with no control over the material carried on the services should not be liable for copyright infringement, provided

1 Ms Vanessa Hutley, General Manager, Music Rights Australia, *Committee Hansard*, 6 March 2018, p. 16.

2 Australian Film & TV Bodies, *Submission 32*, p. 2. See also, News Corp, *Submission 5*, p. 1; Australian Music Publishers Association, *Submission 11*, p.1; Phonographic Performance Company of Australia, *Submission 21*, p. 1.

that they, in essence, take steps to remove infringing content when they are notified.³

2.5 Secondly, it was stated that the proposed extension balances the interests of rights holders with those of important educational institutions. The Phonographic Performance Company of Australia stated that:

...there is a distinction between 'service providers' that are simply conduits to the provision of content and those that have the ability to exercise control and monetise the content on their platforms. The expansion of the safe harbour scheme as set out in the Bill to cover libraries, organisations assisting persons with a disability, archives, key cultural and educational institutions means that commercial operators are not able to undermine the operation of existing digital business models which are licensed on a voluntary basis. The Bill balances the interests of rights holders with those of the important educational and cultural institutions included within the Bill.⁴

2.6 Thirdly, it was argued that the proposed safe harbour scheme provides an efficient and affordable redress for online copyright infringement, as it enables creators to take action against online infringement in a cost-effective and efficient manner.⁵

2.7 Finally, it was argued that the bill 'delivers a scheme that should not distort the commercial market for content and distribution of that content' as the entities to which the bill applies safe harbour do not benefit financially from the content on their networks.⁶ This issue was also addressed by MRA which stated that safe harbour should not be used as a shield to distort commercial negotiations. It noted that in overseas jurisdictions with safe harbour schemes, the misapplication of the schemes has undermined the commercial environment for online music services. This has led to creators, including songwriters, independent recording artists and labels, not being paid for their creative output at market rates, or sometimes not at all. MRA concluded:

APRA AMCOS members and ARIA members should have their legitimate expectations that they will be rewarded for their work recognised and supported through the legislative framework. This bill does that, which is why the music community supports its passage as drafted. This is an innovative solution, and it reflects trends around the world.⁷

3 Ms Kate Haddock, Chair, Australian Copyright Council, *Committee Hansard*, 6 March 2018, p. 12. See also, Ms Vanessa Hutley, General Manager, Music Rights Australia, *Committee Hansard*, 6 March 2018, p. 16.

4 Phonographic Performance Company of Australia, *Submission 21*, pp. 1–2.

5 Australian Publishers Association, *Submission 17*, p. 2.

6 News Corp, *Submission 5*, p. 1. See also, ARIA, *Submission 23*, p. 1; Music Rights Australia, *Submission 36*, p. 2.

7 Ms Vanessa Hutley, General Manager, Music Rights Australia, *Committee Hansard*, 6 March 2018, p. 16.

2.8 Libraries and educational institutions also supported the extension of the safe harbour scheme as proposed in the bill. It was submitted that the bill would:

- enable the implementation of reasonable, efficient and effective remedies for potential online infringements;
- clarify legal requirements and provide protection and certainty; and
- lower the risk involved with digital engagement projects.⁸

Concerns that the proposed amendments will not achieve the policy objective

2.9 Some submitters argued that the proposed amendments may not achieve the Government's policy objective. For example, Redbubble argued that there will be issues of 'practicality' in the distinction being drawn between education/not-for-profit entities proposed to receive safe harbour protection and commercial online service providers. Redbubble submitted that it remains uncertain whether projects between the educational/not-for-profit sector and commercial entities would receive safe harbour protection under the current proposals. Further, Redbubble stated that it will create a complex and confusing system for the takedown of infringing material in Australia:

Rights holders will need to understand the distinction between educational/NFP sector platforms and other platforms and make difficult judgements as to whether the safe harbour process would be applied from one platform to the next.⁹

2.10 The Australian Digital Alliance, while supporting the proposed amendments as 'an important first step', argued that it will not provide a simple, uniform, affordable and non-litigious system for having infringing material online removed. The Australian Digital Alliance stated:

By applying different legal settings for groups providing the same services, this partial solution creates an unnecessarily complex system for takedown of infringing material in Australia. The law will require individual creators to understand the technical and legal difference when their material is hosted on an ISP or a platform, and to know which legal processes apply in each case. Consumers who have made use of free online platforms only to see their materials removed due to accusations of copyright infringement will also miss out on the legal "right of reply" guaranteed them under the scheme, meaning that material taken down incorrectly will often remain down, regardless of objections by the poster.¹⁰

8 National and State Libraries Australasia, *Submission 6*, p. 1; Universities Australia, *Submission 7*, p. 2; Australian Libraries Copyright Committee, *Submission 27*, p. 2.

9 Redbubble, *Submission 18*, p. 6. See also, Australian Libraries Copyright Committee, *Submission 27*, p. 3.

10 Australian Digital Alliance, *Submission 34*, p. 7.

2.11 The Redbubble's collaboration with the State Library Victoria was cited as an example of a project that may not proceed under the proposed amendments.¹¹

2.12 The Australian Information Industry Association (AIIA) argued that there is no point to limiting safe harbour in Australia as most Australian content is hosted on platforms that already operate within other safe harbour regimes. The AIIA stated:

Importantly limiting access to safe harbour does not provide additional protections for Australian content creators. This is because safe harbour is already available for platform providers that host the majority of Australian content, such as Facebook, Google, Youtube, and Amazon through overseas safe harbour schemes. Given Australian content by and large is already subject to safe harbour regimes, limiting safe harbour in Australia then, only serves to inhibit innovation without providing tangible benefits to content creators.¹²

Response from the Department of Communications and the Arts

2.13 The Department of Communications and the Arts (the department) responded to concerns raised by Redbubble and others in relation to collaborations with institutions. The department responded that:

The intention is that the organisations that fall within the definition of service providers and undertake activities comply with the conditions, so, if a university does that and it's in partnership with, say, a private sector organisation, if it is doing it on its system or network, it will be covered as long as it complies with those conditions. In the State Library example, if something was being operated on their network or system and they complied with the conditions, they would be able to rely on safe harbour. That's the policy intention. Whether that affects commercial relationships is not something that the bill deals with.¹³

Stakeholder views on an extension of the safe harbour scheme to all online service providers

2.14 As well as comments on the bill, submitters provided their views on the possible extension of the safe harbour scheme to all online service providers. The committee notes that there have been several consultations on expanding the safe harbour regime over the last 10 years, as well consideration by the Productivity Commission in its report on Intellectual Property Rights Arrangements.¹⁴ The

11 Mr Martin Hosking, Chief Executive Officer, Redbubble Limited, *Committee Hansard*, 6 March 2018, p. 2; Ms Jessica Coates, Executive Officer, Australian Digital Alliance, *Committee Hansard*, 6 March 2018, p. 21.

12 Australian Information Industry Association, *Submission 31*, p. 1. See also, Optus, *Submission 13*, p. 1.

13 Ms Emma Shadbolt, Assistant Director, Department of Communications and the Arts, *Committee Hansard*, 6 March 2018, p. 36.

14 Productivity Commission, *Intellectual Property Rights Arrangements*, 2016.

department also undertook public consultations on an exposure draft of the Copyright Amendment (Disability Access and Other Measures) Bill (the DAOM bill) released in 2015. The DAOM bill proposed amendments to the safe harbour scheme. The amendments were removed from the DAOM bill before being introduced into the Parliament in March 2017. The Government then asked the department to undertake further consultation on the extension of the safe harbour scheme.¹⁵

2.15 As a consequence of these reviews and consultations, the views of those supporting, and those not supporting, the extension of the safe harbour scheme have been well canvassed. The following provides an overview of the issues raised in relation to further safe harbour reform during the bill inquiry.

Support for an extension of the safe harbour scheme

2.16 A range of submitters commented that the proposed amendments are only part of the solution to address perceived problems with Australia's copyright safe harbour scheme. These submitters supported the extension of the safe harbour scheme to online providers and provided a range of reasons for this support.

2.17 It was argued that an extension of the safe harbour scheme will provide legal certainty and protection.¹⁶ The Australian Digital Alliance commented that while the safe harbour laws remain incomplete, Australian technological companies will continue to face increased legal risk and associated costs.¹⁷ Digital Rights Watch added that:

Without a safe harbour regime, service providers are left to their discretion to make judgements about whether content should be removed or not. This is a system with little transparency and almost no due process protections.¹⁸

2.18 Professor Nicholas Suzor also noted that Redbubble and other organisations have indicated that they face difficulties in dealing with the uncertainty of Australian law.¹⁹ Redbubble provided further evidence on this point and noted the proceedings brought by the Pokemon Company International against Redbubble. While the judgment found copyright infringement against Redbubble, only nominal damages of \$1 were awarded. The award was made on the basis that Redbubble's business was 'not directed to profit from infringing of intellectual property' and further that 'Redbubble was seeking to comply with its obligations under law and had processes in

15 Department of Communications and the Arts, *Submission 25*, pp. 2–3. The department provided the list of stakeholders it consulted with and/or received representations from in mid-2017. See Department of Communications and the Arts, *Answer to question on notice No. 1*.

16 National Archives of Australia, *Submission 14*, p. 1; National and State Libraries Australia, *Submission 6*, p. 2; Universities Australia, *Submission 7*, p. 2; DIGI, *Submission 38*, p. 4.

17 Australian Digital Alliance, *Submission 34*, p. 12.

18 Digital Rights Watch, *Submission 26*, p. 1.

19 Professor Nicholas Suzor, *Committee Hansard*, 6 March 2018, p. 9.

place to prevent and mitigate breaches which were reasonable and defensible'. Redbubble concluded:

...despite Redbubble's practices, under the current safe harbour provisions it does not have the benefit of a statutory limitation on the remedies which are available against it.²⁰

2.19 Submitters also argued that the system for the removal of infringing content is complex and costly and will remain so unless safe harbour is extended.²¹ DIGI commented that an extension of the scheme would benefit rights holders by creating a simple and consistent system which provides them with an efficient way to seek the removal of infringing content online without going to court.²² The Australian Libraries Copyright Committee stated:

A localised and universally applicable anti-piracy notice and takedown system for addressing local copyright infringements would increase clarity and reduce costs both for our members and for Australian creators.²³

2.20 Another issue raised by DIGI was that an extension of the safe harbour scheme would protect consumer rights by providing a process (the report and takedown scheme) through which to challenge incorrect claims of copyright infringement.²⁴

2.21 Other arguments put forward in support of an extension of the safe harbour scheme centred around the assistance that would be provided to start-ups and other companies wishing to compete on the world stage and the boost it would provide to the growth of the digital industry in Australia. For example, DIGI commented that, without an extension of the safe harbour scheme, Australian start-ups and service providers will be significantly disadvantaged.²⁵

2.22 It was argued that one barrier to Australian online businesses being more competitive is the lack of protection afforded by a comprehensive safe harbour scheme. The Asia Internet Coalition commented that with 'a less comprehensive safe harbour regime that currently excludes online service providers, Australia is a riskier destination for content hosting since local online innovations do not receive legal protection in return for fighting piracy'.²⁶ Professor Kimberlee Weatherall, Professor

20 Redbubble, *Submission 18*, p. 7.

21 Australian Digital Alliance, *Submission 34*, p. 6.

22 DIGI, *Submission 38*, p. 3.

23 Australian Libraries Copyright Committee, *Submission 27*, p. 1. See also, Asia Internet Coalition, *Submission 19*, p. 2.

24 DIGI, *Submission 38*, p. 3.

25 DIGI, *Submission 38*, p. 2.

26 Asia Internet Coalition, *Submission 19*, p. 2. See also, Australian Digital Alliance, *Submission 34*, p. 9; Ms Nicole Buskeiwicz, Managing Director, DIGI, *Committee Hansard*, 6 March 2018, p. 27.

of Law, University of Sydney, added that being an internet intermediary in Australia is riskier in terms of copyright law than in comparative jurisdictions:

Developments in Australian case law...have made clear that the risks of liability for most internet intermediaries (beyond internet access providers) are real. There have also been developments overseas although, for the most part, they have not changed the fundamental position: comparable jurisdictions make safe harbours available to many internet intermediaries, in circumstances where Australian intermediaries—private and public—risk copyright liability.²⁷

2.23 A number of submitters argued that the legal certainty provided by safe harbour is an enabler of innovation, which is critical in the Australian technology sector and to promoting international competitiveness.²⁸ Redbubble expanded on this argument and noted the growth of companies such as Google, Facebook and Amazon and stated that the US culture of innovation and competition has been critical to this success. Google concurred, stating that YouTube 'literally would not exist today but for the US safe harbour scheme'.²⁹

2.24 However, Redbubble commented that the current Australian copyright laws were created for a pre-internet world and not only do they not work in the age of the internet but also 'do not deal with the reality of user generated contents—UGC'.³⁰

2.25 Redbubble argued that there was an opportunity cost to Australia of a limited safe harbour scheme with start-ups seeking to move offshore to take advantage of the safe harbours in other jurisdictions. Redbubble stated that 'Australia cannot even begin to count the loss from such foregone opportunities, but undoubtedly it will continue to slip further down the innovation ranks'.³¹

2.26 DIGI also commented that the start-up sector had been 'quite vocal' on the issue of safe harbour and had stated that reform of the safe harbour scheme was 'up there with things like R&D tax incentives and 457 visas, in terms of the importance to the industry thriving and surviving in Australia'. DIGI pointed to examples of the importance of technology companies to Australia and concluded that 'the impacts and the consequences of not reforming the safe harbour scheme, and including all online

27 Professor Kimberlee Weatherall, *Submission 37*, p. 1. See also, Redbubble, *Submission 18*, p. 7; Startup Aus, *Submission 22*, p. 1.

28 See, for example, Google, *Submission 24*, p. 2; Australian Digital Alliance, *Submission 34*, pp. 8–9; OneGov, *Submission 33*, p. 5.

29 Mr Michael Cooley, Public Policy and Government Relations Counsel, Google Australia, *Committee Hansard*, 6 March 2018, p. 28.

30 Mr Martin Hosking, Chief Executive Officer, Redbubble Limited, *Committee Hansard*, 6 March 2018, p. 1.

31 Mr Martin Hosking, Chief Executive Officer, Redbubble Limited, *Committee Hansard*, 6 March 2018, p. 3.

service providers, including the tech sector, will have a devastating impact upon Australian innovation'.³²

2.27 It was also submitted that an extended safe harbour scheme would bring Australia into line with many of our major trading partners, would align with best practice and would provide a level playing field with international counterparts.³³ Google Australia commented:

By excluding the commercial sector from our safe harbour scheme as currently proposed in this bill, Australia is looking to adopt a model that exists nowhere else in the world. This will place Australian start-ups and online businesses at a big disadvantage to their competitors in countries that have strong frameworks, such as the United States, Canada, the European Union, the UK, Singapore, South Korea and Japan.³⁴

2.28 Similarly, the Australian Digital Alliance stated:

A full copyright safe harbour is very much the global norm, and is a requirement of most modern bi- and multi-lateral treaties. It is therefore those companies who have chosen to make Australia their home who are penalised by the decision not to include all service providers in our system.³⁵

Concerns relating to further extension of the safe harbour scheme

2.29 The committee also received evidence from those who did not support an extension of the safe harbour scheme beyond the measures proposed by the bill. These submitters argued that safe harbours should not be available to content aggregators, search engines and social media platforms.³⁶ For example, the Australian Society of Authors stated:

The ASA is pleased that the Bill does not extend safe harbour to other kinds of service providers such as content aggregators, search engines and social media platforms. As you would know, the creative sector has vigorously opposed the extension of safe harbour to commercial platforms.³⁷

2.30 APRA AMCOS cautioned against an extension of the safe harbour scheme to intermediaries, particularly to those entities which derive a profit from commercial exploitation of music by way of their services, as this would jeopardise rights holders'

32 Ms Nicole Buskiewicz, Managing Director, DIGI, *Committee Hansard*, 6 March 2018, pp. 30-31.

33 OneGov, *Submission 33*, p. 5.

34 Mr Michael Cooley, Google Australia, *Committee Hansard*, 6 March 2018, pp. 27–28.

35 Australian Digital Alliance, *Submission 34*, p. 10.

36 Arts Law Centre of Australia, *Submission 3*, p. 2; Village Roadshow; *Submission 10*, p. 1; Copyright Agency, *Submission 16*, p. 2.

37 Australian Society of Authors, *Submission 4*, p. 1.

ability to realise returns on their creative and financial investment. APRA AMCOS argued that this bill should represent the end of the Government's reforms in this area.³⁸

2.31 The Australian Copyright Council contended that there would be four major detrimental consequences should safe harbour be extended to all online platforms which are not passive carriers:

- for those platforms where licences to use copyright material are available, the incentive to enter into a licence agreement would be significantly diminished;
- online platforms would not have to bear the risk of publication which other publishers bear—this would give online platforms an unfair advantage over traditional publishers;
- when the publisher does not bear the risk of publication, all of the risk is placed on the author of the infringing content. That means that, although the publisher has profited from the publication of the content, it is only the uploader who is liable to pay damages; and
- the only stakeholder who really suffers in the infringement scenario is the original copyright owner.³⁹

2.32 The Australian Copyright Council concluded:

The safe harbour system, when it's applied to content platforms that are not passive providers, including those that generate billions of dollars a year in revenue, encourages wilful blindness on the part of the platform proprietor. The only stakeholder who bears a risk is the creative copyright owner, which is why we urge that the bill remains in its current form.⁴⁰

2.33 APRA AMCOS also pointed to the licensing arrangements already in place and explained:

There are simple, efficient, collective licensing solutions that are available to the online platforms that we're discussing today—and I'm not just talking about the YouTubes and the Facebooks of this world; I'm talking about the smaller platforms. APRA AMCOS, for its part, has a tailored licence that is aimed at start-up organisations, with reduced licence fees, simplified reporting arrangements, phase-in rates—all for the purpose of providing a simple licensing solution, rather than those platforms getting a free kick

38 APRA AMCOS, *Submission 12*, p. 2.

39 Ms Kate Haddock, Chair, Australian Copyright Council, *Committee Hansard*, 6 March 2018, p. 12.

40 Ms Kate Haddock, Chair, Australian Copyright Council, *Committee Hansard*, 6 March 2018, p. 13.

under an exception to the Copyright Act. So that's really the position that our members have.⁴¹

2.34 Submitters opposed to the further extension of the safe harbour scheme also questioned the argument that this was a necessary step to ensure continued innovation in the digital sector. MRA argued that it is an 'unproven premise' that to do so is a pre-requisite for stimulating digital growth in Australia.⁴² MRA also stated that it 'did not believe that this is a discussion between copyright owners and innovation' rather it is a 'question of rewarding adequately in a digital environment and not using the safe harbour as a shield to distort commercial negotiations'.⁴³

2.35 In response to comments regarding possible complexity that may be introduced as a consequence of the limited safe harbour proposed by the amendments, the Australian Copyright Council stated that:

As to the confusion and complexity of the law, our view is that the copyright law is not a textbook. It's not a text that can be analysed by academics; it's a practical working manual for people who make a living out of copyright material. The systems as they operate in real life and in commercial practice can be complex, but the people who operate the systems are expert. Users of copyright material, particularly online, benefit from very widespread licensing arrangements that ensure that most activity that occurs online through the major content providers is not infringing. Most of those commercial relationships are appropriate and amicable, in my experience.⁴⁴

2.36 MRA also commented on the United States safe harbour system—US Digital Millennium Copyright Act of 1998 (DMCA)—and noted that it is currently being reviewed. It went on to state that over time the 'legislation has been read down through significant litigation in such a way that it now acts to distort the market'. In its view:

...the US is struggling with the very issue which we think this bill has resolved. There's a commercial environment which has a different dynamic and a different place to have discussions, which is through licensing, and then there are the passive and automatic groups, such as the classes identified here in this bill.⁴⁵

41 Mr Jonathan Carter, Head of Legal, Corporate and Policy, APRA AMCOS, *Committee Hansard*, 6 March 2018, p. 17.

42 Music Right Australia, *Submission 36*, Attachment 1, Exposure draft submission, p. 4.

43 Ms Vanessa Hutley, General Manager, Music Rights Australia, *Committee Hansard*, 6 March 2018, p. 18.

44 Ms Kate Haddock, Chair, Australian Copyright Council, *Committee Hansard*, 6 March 2018, p. 14.

45 Ms Vanessa Hutley, General Manager, Music Rights Australia, *Committee Hansard*, 6 March 2018, p. 18.

Safe harbour schemes and piracy

2.37 A major issue raised in evidence was the impact of safe harbour on efforts to combat piracy. Submitters provided a range of views in relation to piracy with some submitters argued that safe harbour limits piracy.

2.38 Google, for example, stated that safe harbour encourages a system of shared responsibilities that actually increases the ability of all actors to fight piracy.⁴⁶ OneGov, added that extending safe harbour helps to limit piracy by providing a clear framework to take down pirated content in a fast, easy and affordable way. This in turn makes it harder to access illegal content. OneGov concluded:

Safe harbour is a sensible solution that allows content creators and policy makers time to develop strategies against piracy that tackle the issue holistically.⁴⁷

2.39 Other submitters pointed to the DMCA as an example of a safe harbour regime that has:

...led to further ongoing collaborative efforts to improve the efficiency and effectiveness of the DMCA notice-and-take-down system with voluntary measures...Comprehensive safe harbour protections make collaboration and innovation in tools to address online piracy possible.⁴⁸

2.40 Redbubble commented that 'the DMCA brings order to this chaos and allows the content owners to dictate how their rights are enforced, while allowing marketplaces like Redbubble and content owners a clear avenue by which to engage and a clear process to operate within'.⁴⁹ The Australian Digital Alliance expanded on this point and commented that a comprehensive safe harbour system allows those with the fewest resources to understand how to combat piracy and to take legal action. The Australian Digital Alliance concluded:

The whole point of a cover-the-field safe harbour system is to ensure that everybody is encompassed within the same system, not to pick and choose those few big people who can afford it and can work in the system and leave a system that excludes everybody else. This is why licensing is great, but it doesn't replace a proper legislative system.⁵⁰

46 Mr Michael Cooley, Google Australia, *Committee Hansard*, 6 March 2018, p. 28.

47 OneGov, *Submission 33*, p. 5. See also, Australian Information Industry Association, *Submission 31*, p. 1.

48 Google, *Submission 24*, pp. 5–6.

49 Redbubble, *Submission 18*, p. 3. See also, Mr Martin Hosking, Chief Executive Officer, Redbubble, *Committee Hansard*, 6 March 2018, p. 2.

50 Ms Jessica Coates, Executive Officer, Australian Digital Alliance, *Committee Hansard*, 6 March 2018, p. 22.

2.41 However, other submitters did not agree that safe harbour is beneficial to limiting piracy. MRA contended that music rights holders in Australia have not benefitted fairly or proportionately from the digital music consumption because overly broad safe harbour schemes have distorted the markets. MRA stated that:

Uncertainty around the proper application of safe harbours has emboldened services that make available user-uploaded content to take an "act first, negotiate later" approach, building large music services without a licence, fundamentally distorting the negotiation process. If they do enter into licence negotiations (as opposed to carrying on business in the hope they will not be sued), the choice for rights holders is to

1. accept the terms on offer and get some return for the use of their music;
2. rely on ineffective notice and takedown procedures provided in safe harbour legislation to try to prevent their content being distributed without a licence; or
3. sue the service under an uncertain legal framework and delay any chance of getting income from their music.⁵¹

2.42 As to the effectiveness of notice to takedown procedures to prevent piracy, the Arts Law Centre Australia noted the burden placed on rights holders to monitor and issue takedown notices relating to reposting of infringing content once a take-down notice has been issued. It submitted service providers are better placed to undertake this activity than copyright holders.⁵²

2.43 MRA also considered notice and takedown systems are ineffective against piracy, noting that most service providers remove only the specific URL link notified in the takedown notice without taking any further action. MRA stated:

This makes the process ineffective because (a) even if one URL link or one copy of an infringing file is removed, there are typically many thousands of other URL links to, or other copies of, the same infringing title that remains on line; and (b) content or links once removed are often quickly reposted and most service providers do not take steps to prevent this.⁵³

2.44 MRA also argued that pirate sites benefit under the notice and takedown regime:

Under the guise of the notice and take down policy, pirate sites purport to operate legally, knowing that rights holders will have to incur huge expenses in suing them to establish that safe harbours do not apply and/or engage in mass notification programs which are not effective in preventing

51 Music Rights Australia, *Submission 36*, Attachment 1, Exposure draft submission, p. 6.

52 Arts Law Centre Australia, *Submission 3*, p. 3. See also, Australian Society of Authors, *Submission 4*, p. 2.

53 Music Rights Australia, *Submission 36*, Attachment 1, Exposure draft submission, p. 8.

infringement. The problem is compounded by uncertainty over the scope of safe harbours, making litigation complex, lengthy, and costly.⁵⁴

The Government's approach to safe harbour reform

2.45 The department submitted that the Government has taken an incremental approach to safe harbour reform. It noted that by taking the first step to extend safe harbour to educational and cultural institutions and organisations assisting people with a disability, the Government will ensure that 'these sectors, which provide beneficial services to the Australian community, are afforded protection sooner rather than later'.⁵⁵

2.46 In relation to further reform, the department observed that 'a blanket extension still remains a highly contested reform' with polarised views of stakeholders leading to a lack of consensus on a full extension. The department added that there was more consensus in extending the scheme as proposed by the bill.⁵⁶ The committee was informed that the department had undertaken consultations with stakeholders in order to 'try and understand and unpick all of the issues around such a complex issue'.⁵⁷ It would also continue to consult stakeholders.

2.47 The department also stated that:

Incremental reform also allows the Government to develop conditions for safe harbours in synchrony with international developments to ensure that our scheme is effective and consistent with our international counterparts.⁵⁸

2.48 The department also commented on the argument that safe harbour supported innovation. The department noted that there are a number of countries which do not have safe harbour but still have innovation. It added that it had received 'disputed evidence about how important safe harbour is to innovation' and noted that there are other factors at play in creating an environment for innovation which business needs to take into account.⁵⁹ The department went on to state that it had looked for 'strong evidence that linked safe harbour to innovation', however:

We didn't find that direct linkage. There's some evidence about a general copyright approach. I know that there have been some studies that have looked at flexible exceptions and their contribution to innovation. But we

54 Music Rights Australia, *Submission 36*, Attachment 1, Exposure draft submission, p. 8.

55 Department of Communications and the Arts, *Submission 25*, p. 5.

56 Dr Carolyn Patteson, First Assistant Secretary, Content, Department of Communication and the Arts, *Committee Hansard*, 6 March 2018, p. 35.

57 Dr Carolyn Patteson, First Assistant Secretary, Content, Department of Communication and the Arts, *Committee Hansard*, 6 March 2018, p. 37.

58 Department of Communications and the Arts, *Submission 25*, p. 5.

59 Ms Kirsti Haipola, Legal Director, Department of Communication and the Arts, *Committee Hansard*, 6 March 2018, p. 37.

did not find any evidence that directly linked safe harbour to an increase in innovation.⁶⁰

2.49 The department also commented on the reviews of both the US and EU safe harbour schemes. While agreeing that neither of these reviews are necessarily looking at pulling back on who the safe harbours apply to, it commented that 'what has happened overseas and what is in place overseas is important, but we need to look at what is appropriate and fit for purpose in Australia'. The department added that:

The complexity of the issues and the really diverse views and polarised views of stakeholders makes it a really difficult path to navigate, and that is why we are really trying to take what is a balanced approach where there is an openness to extending safe harbour.⁶¹

Drafting issues

2.50 Submitters raised drafting issues which they argued may lead to unintended consequences.

2.51 First, the Law Council of Australia (LCA) argued that the wording of subsection 116ABA(1) (definition of a service provider) is unclear as it can be read exclusively or inclusively. In addition, the LCA commented on the wording of subsection 116ABA(2). This subsection is intended to clarify that, if a body administering the institutions covered by the definition of service provider in subsection 116ABA(1) has other functions unrelated to these institutions, those functions will not be covered by the safe harbour scheme.⁶² The LCA noted that subsection 116ABA(2) provides that only activities done because of a 'relationship' between the administering body and the institution fall within the safe harbour. The LCA considers the concept of 'relationship' is unclear and stated that only activities done because of a 'relationship' fall within the safe harbour.⁶³

2.52 The LCA recommended that the entities to be included within the definition of 'service providers' and which activities are to be covered be clarified.⁶⁴

2.53 Secondly, a number of submitters raised concerns with the use of 'by' rather than 'by or on behalf of' in the legislation relating to the institutions intended to be covered by the safe harbour scheme. Universities Australia argued that this drafting creates uncertainty:

60 Ms Kirsti Haipola, Legal Director, Department of Communication and the Arts, *Committee Hansard*, 6 March 2018, p. 38.

61 Dr Carolyn Patteson, First Assistant Secretary, Content, Department of Communication and the Arts, *Committee Hansard*, 6 March 2018, p. 39.

62 EM, p. 7.

63 Law Council of Australia, *Submission 35*, p. 2.

64 Law Council of Australia, *Submission 35*, p. 2.

...the current drafting could potentially be construed as limiting the protection of the safe harbours to activities that are carried out "by" a university itself, which could potentially leave universities outside the scope of the safe harbours in the event that the relevant activities were carried out by a third party provider "on behalf" of the university.⁶⁵

2.54 The Copyright Advisory Group to the COAG Education Council recommended that the bill be amended to make it clear that the safe harbour extends to activities carried out by a third party 'on behalf' of an entity that is a service provider under the bill.⁶⁶ The LCA also supported this approach and commented that 'it would allow public interest organisations to innovate entirely in-house, but also then use services and products developed in the private sector'.⁶⁷

Committee view

2.55 The committee notes that the Government has had the benefit of the outcomes of a number of reviews of the extension of safe harbour and the extensive consultation by the department on this matter. These reviews and consultations highlighted the highly polarised views and lack of consensus on further safe harbour reform. Similarly, the committee received conflicting evidence. In particular, the committee notes the evidence from those arguing that safe harbour reform will benefit innovation. However, in its evidence to the committee, the department stated that it did not find evidence to support this argument.

2.56 Given the divergence of stakeholder views and the complexity of the issues being considered, the committee supports the Government's incremental approach to safe harbour reform. The proposed amendments will ensure that educational and cultural institutions and organisations assisting people with a disability will be afforded protection immediately. The committee considers this to be a balanced and reasonable approach. The committee also notes and appreciates the reassurance that the department will continue its consultation with stakeholders.

2.57 In addition, the committee notes the comments of submitters relating to the use of 'by' rather than 'by and on behalf of' in the bill. The committee is of the view that the department should consider whether legislative certainty is required in relation to this matter.

65 Universities Australia, *Submission 7*, p. 2.

66 Copyright Advisory Group to the COAG Education Council, *Submission 9*, p. 3.

67 Law Council of Australia, *Submission 35*, p. 3.

Recommendation 1

2.58 The committee recommends that the Senate pass the bill.

**Senator Jonathan Duniam
Chair**