



Internet Society of Australia
A Chapter of the Internet Society
ABN 36 076 406 801

Correspondence: P.O. Box 1705, North Sydney NSW 2059

Regd Office: Maddocks, Level 7, 140 William Street, Melbourne 3000

27 April 2012

Mr Tony Pirani
Assistant Secretary, Business Law Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600
copyright@ag.gov.au

Dear Mr Pirani

Re: Draft Terms of Reference for the ALRC Reference on Copyright

ISOC-AU is a non-profit society founded in 1996, and is a chapter of the worldwide Internet Society. The organisation represents the interests of all categories of Internet users in Australia, and promotes Internet-related developments in Australia for the whole community.

We attach a Submission in relation to the above Draft Terms of Reference.

Thank you for your consideration.

Yours sincerely

Roger Clarke, Chair ISOC-AU Policy Committee
Roger.Clarke@xamax.com.au
for the Board of the Internet Society of Australia

Holly Raiche
h.raiche@internode.on.net

Internet Society of Australia
Draft ALRC Terms of Reference
Copyright and the Digital Economy

The Internet Society of Australia welcomes this opportunity to respond to The Attorney-General's draft terms of reference for the ALRC review of Copyright and the Digital Economy.

The Internet Society of Australia (ISOC-AU) is a non-profit society which promotes the Internet development in Australia for the whole community. ISOC-AU is a chapter of the worldwide Internet Society and is a peak body organisation, representing the interests of Internet users in Australia.

Our fundamental belief is that the Internet is for everyone. We provide broad-based representation of the Australian Internet community both nationally and internationally from a user perspective and a sound technical base. We also consistently promote the availability of access to the Internet for all Australians.

Increasingly, the Internet is the way that the public gains access to information, services and entertainment. With the rapid changes in technology and how the public accesses content, the existing copyright framework of copyright protections with its enumerated exemptions should be replaced by a more flexible approach that continues to provide protection for copyright holders without stifling innovation of new products and services, and without prejudicing the public's continuing access information and services in new ways. Quoting from the 1994 Copyright Convergence Group report:

These new information networks and associated industries will have the capacity to enhance all levels of national social and economic endeavour. They will link Australia more firmly into the global economy. But the promise of these information structures can only be fully realised if the product they exist to transmit - the-content - is effectively protected. The challenge for copyright law in this new environment is to demonstrate that it can continue to effectively provide a just and acceptable balance between the valid interests of intellectual property rights owners and the public interest in fair and reasonable access to a wide range of information.¹

Our specific comments on the draft terms of reference are as follows:

¹ Copyright Convergence Group, Highways to Change: Copyright in the New Communications Environment, August 1994, P. 7

Matters to be considered:

The terms of reference suggest that the ALRC, in its review, will have regard to the following:

- *the objective of copyright law to promote the production of original copyright materials;*
- *the need for copyright law to provide an appropriate balance between the rights of creators and the rights, interests and expectations of users and the public so as to foster creativity and innovation and promote cultural development;*
- *the importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies; and*
- *Australia's international obligations, including any existing or proposed international obligations.*

We support the first three items as framing this review. We have concerns, however, with the fourth item relating to existing or proposed international obligations. While Australia is a signatory to the Anti-counterfeiting Trade Agreement (ACTA), it has not yet ratified the treaty, which remains controversial in many jurisdictions. Similarly, the US draft legislation, Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA) were highly controversial even within the US and the consideration of those bills has since been shelved.

Recommendation

The fourth matter to be considered delete the phrase , including any existing or proposed international obligations.

Terms of Reference:

Amongst other things, the ALRC is to consider whether further exceptions should be provided to:

- *facilitate legitimate use of copyright works to create and deliver new products and services of public benefit; and*
- *allow legitimate non-commercial use of copyright works for uses on the internet such as social networking.*

This introductory statement suggests that the ALRC's approach should be a piecemeal one; it should accept the existing structure of copyright legislation with

its general rights on copyright protection, and exceptions added as new technologies allow copyright material to be accessed in new ways. We believe that a more flexible approach is needed. Quoting from the submission by the Australian Digital Alliance and the Australian Libraries Copyright Committee to the National Cultural Policy Discussion:

... strong protections in copyright law may inadvertently restrict the potential for innovation and creation. The advent of the internet has heightened tensions between monopoly rights of creators and the broad dissemination of knowledge and community participation that is the internet's greatest asset. It's important that protection of the interests of rights holders is balanced against wider public interest in the advancement of learning, innovation, research and knowledge.

A balanced and flexible copyright regime is essential to bring the arts and creative industries into the mainstream of Australian life.

The approach that we believe will produce a better balance between rights holders and the public would be to develop a broader, flexible concept of fair dealing so that, if set criteria are addressed and met, public access to the content would not infringe copyright. The criteria could include factors such as the purpose of the use (commercial/not commercial), the nature of the content itself, the amount of material used/copied and the harm or likely harm caused by the use/copying.² The criteria would be technology neutral so as not to be outdated as new technologies allow public access to material in new ways.

Recommendation

That the overall term of reference be broadened to include consideration of a broad, flexible concept of fair dealing that is technology neutral and can be applied across the range of copyright scenarios.

² See, for example, presentations at the recent ADA conference at <http://www.digital.org.au/content/2012-ada-copyright-forum-presentations-now-available-online>

Scope of Reference

The Review is to also consider the following:

- *take into account the impact of any proposed legislative solutions on other areas of law and their consistency with Australia's international obligations;*
- *take into account recommendations from related reviews, in particular the Government's Convergence Review; and*
- *not duplicate work being undertaken on: unauthorised distribution of copyright materials using peer to peer networks; the scope of the safe harbour scheme for ISPs; a review of exceptions in relation to technological protection measures; and increased access to copyright works for blind and visually impaired people.*

Generally, we agree with the above scope of the reference. However, it is not clear how the review cannot at least take account of the outcomes of both the Attorney-General's review of the safe harbour scheme³ and the High Court's decision on appeal of the *Roadshow*⁴ case.

In the digital age, it is not possible to look at a copyright regime without considering the many ways in which the public can access material, and where responsibility lies for its dissemination, the enforcement of copyright law and education of the public on both respecting the rights of content owners and understanding their rights to access content in a digital age.

³ Attorney-General's Department, Revising The Scope of the Copyright 'Safe Harbour Scheme: Consultation paper, October 11

⁴ *Roadshow Films Pty Limited v iiNET Limited* [2011] FCAFC 23