

1. Introduction to the Inquiry

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Introduction

1.1 This is the second stage in the consultation process in this Inquiry into whether the *Copyright Act* needs amendment to allow Australia to fully participate in a modern, digital economy. The first stage included the release of the Issues Paper, *Copyright and the Digital Economy* (ALRC IP 42), which generated 295 submissions.¹

1.2 In releasing this Discussion Paper, the ALRC again calls for submissions to inform the final stage of deliberations leading up to the final Report, which is to be provided to the Attorney-General by the end of November 2013. This introductory chapter and Chapters 2 and 3 provide an overview of the policy framework and the background to questions and proposals in the Discussion Paper. They set out in detail the issues raised by the Terms of Reference, the research behind the proposals, a thorough analysis and discussion of stakeholder views.

1.3 In considering whether changes are needed to the *Copyright Act*, and options for reform, the ALRC is required to consider whether existing exceptions to copyright are appropriate, and whether further exceptions should be introduced. In doing so the ALRC has to take into account the impact of proposed changes on other areas of law, consistency with Australia's international obligations and recommendations from other reviews.

Matters outside the Terms of Reference

1.4 In performing its functions in relation to this Inquiry, the ALRC has been asked not to duplicate work being undertaken in four areas of importance to the digital economy, namely:

- unauthorised distribution of copyright material using peer-to-peer networks;
- the scope of a safe harbour scheme for Internet Service Providers;

¹ The public submissions are available on the ALRC website at: www.alrc.gov.au.

- exceptions in relation to technological protection networks; and
- increased access to copyright works for persons with a print disability.

1.5 The items listed are under discussion at government level or the subject of separate processes. The first bullet point refers to concerns about controlling the unauthorised distribution of copyright material using the internet as a file sharing network. This type of sharing was originally typified by the Napster music file-sharing service and is now perhaps most commonly associated with the use of the BitTorrent peer-to-peer file sharing protocol. However, the focus of the ALRC inquiry is on legal exceptions to copyright rather than on measures to combat copyright infringement.

1.6 The second and third bullet points of the matters listed above concern work the ALRC is ‘not to duplicate’. This refers to work being undertaken by the Attorney-General’s Department into the safe harbour scheme for internet service providers (ISPs)² and technological protection measures (TPMs)³ respectively. An Attorney-General’s Department Consultation Paper *Revising the Scope of the Copyright Safe Harbour Scheme* was released in 2011.

1.7 The fourth bullet point above refers to initiatives to facilitate access to published works by the visually impaired and the print disabled, including through the World Intellectual Property Organization (WIPO). WIPO discussed an instrument providing access to copyright works for persons with a print disability at its 24th Session in Geneva, July 2012.⁴

1.8 A number of submissions pointed out that enforcement, ISP safe harbour schemes and TPMs are matters of importance to many stakeholders, and highlighted the difficulty of making recommendations on matters within the Terms of Reference without taking account of the issues the ALRC is directed not to inquire into.⁵ The ALRC, in conducting this Inquiry, has been receptive to concerns and the need to take into account enforcement and other issues faced by stakeholders.

1.9 APRA/AMCOS noted that to ‘maximise the potential contribution of content industries in the digital economy there are a number of significant challenges which will need to be overcome.’ This includes the ‘the ease with which digital content can be distributed and copied’ and ‘meaningful regulation of the ISP industry’.⁶

2 The ‘safe harbour’ scheme refers to the provisions of the *Copyright Act* limiting remedies available against carriage service providers for infringements of copyright relating to carrying out of online activities: *Copyright Act 1968* (Cth) pt V, div 2AA. See Australian Government Attorney-General’s Department, *Revising the Scope of the Copyright ‘Safe Harbour Scheme’* (2011), Consultation Paper.

3 The use of circumvention technology to gain unauthorised access to electronic copyright works led to the amendments contained in the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). See further Australian Government Attorney-General’s Department, *Review of Technological Protection Measure Exceptions made under the Copyright Act 1968* (2012).

4 World Intellectual Property Organisation, *Standing Committee on Copyright and Related Rights: Twenty-Fourth Session* (2012).

5 iGEA, *Submission 192*, see also Australian Film/TV Bodies, *Submission 205*; Motion Picture Association of America Inc, *Submission 197*; Music Rights Australia Pty Ltd, *Submission 191*.

6 APRA/AMCOS, *Submission 247* citing also International Federation of the Phonographic Industry, *Digital Music Report 2012: Expanding Choice, Going Global* (2012).

1.10 Other stakeholders also raised the need to consider ISP and intermediary liability.⁷

Related inquiries

1.11 Policy makers around the world are actively reconsidering the relationship between copyright exceptions and innovation, research, and economic growth, with a view to ensuring that their economies are capable of fully utilising digital technology to remain competitive in a global market.

1.12 Relevant Australian reviews notably include previous work by the Copyright Law Review Committee, including *Simplification of the Copyright Act*⁸ and *Copyright and Contract*.⁹ Other relevant reviews include the Ergas Report,¹⁰ the Cutler Review¹¹ and the 2011 Book Industry Strategy Group Report.¹²

1.13 In its 2005 Fair Use Review, the Attorney-General's Department looked at whether it was appropriate to introduce a general fair use exception into the *Copyright Act*.¹³ This review resulted in the time shifting, format shifting, parody and satire and flexible fair dealing exceptions being introduced into the Act in 2006.¹⁴

1.14 The interaction of copyright and contract is a relevant aspect of the current Inquiry, as the real value of copyright to many comes from arrangements that build on, but are only partly related to, property rights in copyright. One concern is that contractual provisions may unjustifiably restrict practices of users which are otherwise allowed. On the other hand, contractual arrangements may have the capacity to render nugatory the rights of creators.

1.15 The interaction between copyright and contracts is important in finding the balance between private arrangements and proprietary rights. As the Ergas Report noted, non-legislative alternatives to property rights (such as contractual mechanisms) may be *effective* but they run the risk of not being *efficient* in that social costs 'would almost certainly be higher under such arrangements, than they are under the current panel of protective instruments'.¹⁵

7 COMPPS, *Submission 266*; AFL, *Submission 232*; AMPAL, *Submission 189*; Arts Law Centre of Australia, *Submission 171*.

8 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998).

9 Copyright Law Review Committee, *Copyright and Contract* (2002).

10 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).

11 Department of Innovation, Industry, Science and Research, *Powering Ideas: An Innovation Agenda for the 21st Century* (2009).

12 Book Industry Strategy Group, *Final Report* (2011). See also Australian Government, *Government Response to Book Industry Strategy Group Report* (2012).

13 Australian Government Attorney-General's Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age*, Issues Paper (2005).

14 *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

15 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 25.

1.16 At the same time as this Inquiry, the Government is undertaking a review of contract law to increase efficiencies and boost productivity, with a view to improving the attractiveness of Australia as a business and investment destination.¹⁶ It is likely that the ‘costs, difficulties, inefficiencies or lost opportunities for business’, which that review will look at, will also be relevant to this Inquiry.¹⁷

1.17 The Convergence Review¹⁸ examined Australia’s communications and media legislation and advised the Government on potential amendments to ensure this regulatory framework is effective and appropriate in the emerging communications environment. The Convergence Review Committee was established to examine the operation of media and communications regulation in Australia and assess its effectiveness in view of the convergence of media content and communications technologies. Although copyright law and media regulation involve different regulatory environments and different industry players and conditions, these intersect and are therefore integrally related.

1.18 The Convergence Review noted that copyright-related issues in general may have implications for investment in the content services market. Advances in technology and evolving business models are providing new ways of accessing and distributing content, which are likely to have implications for content rights holders, and for users, in the converged environment. These changes have been highlighted in recent developments, such as the ruling of the Federal Court on the Optus cloud-based TV Now service.¹⁹ The Convergence Review proposed that the issue of copyright and the retransmission of free-to-air broadcasts be examined as part of this Inquiry and that, in investigating content-related competition issues, the proposed new communications regulator should have regard to copyright implications and be able to refer any resulting copyright issues to the relevant minister for further consideration by the Government.

1.19 In the UK the Hargreaves Review²⁰ was intended to reshape copyright to be ‘fit for purpose’ in the digital environment. In its response to the Review the UK Government agreed that ‘the IP framework is falling behind and must adapt’.²¹ A key aspect of this is said to be that:

the award of a limited monopoly to creators, in respect of their works, is balanced by limitations as to term and scope and exceptions for public benefit, such as the “fair use” or “fair dealing” exceptions variously found in different legal systems. In recent

16 Australian Government Attorney-General’s Department, *Improving Australia’s Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law* (2012).

17 Submissions for the contract law review were due on 20 July 2012, and are available at <http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Review-of-Australian-Contract-Law.aspx>.

18 Australian Government Convergence Review, *Convergence Review Final Report* (2012).

19 The Federal Court at first instance ruled that this service does not infringe any rights conferred by the *Copyright Act 1968* (Cth) but was a form of ‘time shifting’ allowed by s 111 of the Act. On appeal, the Full Federal Court overturned this decision: *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147. See Ch 10.

20 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

21 UK Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011), 2.

years, awareness has grown of the value both to users and to economic growth of a public domain created by such limitations and exceptions, complementing a productive copyright-protected zone.²²

1.20 In January 2013, the European Commission announced seven new priorities for the European Digital Economy and Society. One of these steps is to ensure the EU copyright framework ‘remains fit for purpose in the digital context’.²³ Among the proposals are new EU Directives concerning activities of collecting societies in order to facilitate introduction of new business models that enhance online distribution of music. A review of copyright law is also taking place in Ireland²⁴ and the report date has been extended in light of the large number of submissions received in response to a discussion paper. In April 2013, the US House of Representatives announced ‘a comprehensive review of US copyright law’.²⁵

1.21 In 2012, Canada introduced a *Copyright Modernization Act*²⁶ which includes an amendment to address the issue of user-generated content and specifically recognises fair dealing for educational purposes, as well as a number of other matters under consideration as part of the ALRC Inquiry.

Reform proposals

1.22 The reforms proposed in this Discussion Paper include the introduction of a broad, flexible exception for fair use of copyright material and the consequent repeal of many of the current exceptions in the *Copyright Act*, so that the copyright regime becomes more flexible and adaptable. An alternative model, should fair use not be enacted, suggests the addition of new fair dealing exceptions, recognising fairness factors. Other reform proposals relate to the replacement of certain statutory licences with voluntary licensing more suited to the digital environment; the use of orphan works; provisions relating to preservation of copyright material by cultural institutions; and contracting out of the operation of certain copyright exceptions. Two alternative proposals relating to the scheme for the retransmission of free-to-air broadcasts are set out for comment from stakeholders, in addition to other proposals relating to broadcasting.

How to make a submission

1.23 With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions,

22 L Edwards, *Hargreaves, Copyright, Technology and the Future of the Creative Industries : a UK multidisciplinary perspective*, Centre for Copyright and New Business Models in the Creative Economy <www.create.ac.uk/hargreaves-copyright-technology-and-the-future-of-the-creative-industries> at 1 February 2013.

23 European Commission, *Orientation Debate on Content in the Digital Economy* (2012).

24 Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012).

25 US House of Representatives, Committee on the Judiciary, ‘Chairman Goodlatte Announces Comprehensive Review of Copyright Law’ (Press Release, April 24, 2013).

26 *Copyright Modernization Act, C-11 2012* (Canada). See further M Patterson, R McDonald, Fraser Milner Casgrain LLP, *The Copyright Modernization Act: Canada’s New Rights and Rules* <www.lexology.com/library> at 22 March 2013.

or to any of the background material and analysis provided, to help advance the reform process in this Inquiry.

1.24 There is no specified format for submissions, although the questions and proposals provided in this document are intended to provide guidance for respondents. The ALRC welcomes submissions, which may be made in writing, by email or using the ALRC's online submission form. Submissions made using the online submission form are preferred.

1.25 Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.