

21 November 2011

Ms Toni Pirani
Assistant Secretary
Business Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: toni.pirani@ag.gov.au

Dear Ms Pirani

EXPANDING THE SCOPE OF COPYRIGHT SAFE HARBOURS

The Australian Digital Alliance (ADA) and Australian Libraries Copyright Committee (ALCC) welcome the opportunity to respond to the Attorney-General's Consultation Paper on revising the scope of the safe harbour scheme in the *Copyright Act 1968 (Act)*.

The lack of a safe harbour for the range of service providers contemplated by the *Australia-United States Free Trade Agreement (AUSFTA)* is a serious impediment to the growth of Australia's digital economy. Common activities - transmitting data, caching, hosting and referring users to an online location - where service providers do not control, initiate or direct the users' online activities are currently not covered by the scheme. Currently, ADA and ALCC members including universities, libraries, schools, cultural institutions and IT companies provide internet services without the benefit of the same safe harbour as their equivalents overseas.

Universities and libraries provide internet services for use by employees, students and other members of the public, which in some cases can number in the tens of thousands. These bodies take a number of steps to prevent copyright infringement on their servers and have implemented policies for responding to instances of alleged infringing conduct. Currently, taking such steps does not insure universities and libraries against actions taken by taken by copyright holders for the infringing conduct of users of their IT systems.

The ADA recently sought leave to intervene in the High Court matter *Roadshow Films & Ors v iiNet Limited* on behalf of universities, libraries and other non-commercial providers of internet services who operate without any degree of certainty regarding their liability for authorisation of copyright infringement. Extending the scope of the safe harbour scheme to the proposed four categories of activity would greatly alleviate this uncertainty.

As noted in the consultation paper, Division 2AA of Part V of the Act – Limitation of remedies available against carriage service providers - sets out safe harbours to protect four categories of activity:

- Category A – providing facilities or services for the transmission of copyright material;
- Category B – caching (via an automated process);

- Category C – storing copyright material at the direction of a user; and
- Category D – referring users to an online location using information location tools.

The ADA and ALCC submit that the term “carriage service provider” in Division 2AA of Part V of the Act be replaced with the term “service provider” as used in the equivalent US Digital Millennium Copyright Act (DCMA). Further, the ADA and ALCC suggest that the same definition of “service provider” set out in the DCMA and the AUSFTA be adopted.

The definition of Service Provider set out in the AUSFTA is:

“service provider, in relation to a Category A activity, means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user’s choosing”.

“service provider, in relation to a Category B, C or D activity, means a provider or operator of facilities for online services or network access”.

The Consultation Paper suggests the following definition to describe the service providers proposed to be covered by an extended safe harbour scheme:

A person who provides services relating to, or provides connections for, the transmission or routing of data; or operates facilities for, online services or network access, but does not include such person or class of persons as the Minister may prescribe in the Regulations.

1 Scope of the Definition

The scope of the definition appears to be broadly similar to the definition in the AUSFTA, and is simple, effective and technology neutral. While the ADA and ALCC believe there may be some merit in adopting language closer to the AUSFTA definition of ‘service provider’ in our view the language suggested in the Consultation Paper is likely to achieve the same practical outcome. The ADA and ALCC also consider that it would be preferable to expand the second limb of the definition to include “provides” before the words “or operates facilities for”, to capture the provision of internet services by universities, libraries, and other private and public sector organisations. Accordingly, the definition of service provider would be:

*A person who provides services relating to, or provides connections for, the transmission or routing of data; or **provides** or operates facilities for online services or network access.*

We note that the comma after “for” in the phrase “operates facilities for, online services...” appears to be a typographical error and have removed it in rephrasing the definition.

2 The ability of the Minister to exclude providers by Regulation

The ADA and ALCC do not support the introduction of a power for the Minister to exclude a person or class of persons from the safe harbour scheme through Regulations. The introduction of such a power undermines the purpose of the safe harbour scheme, being to provide certainty for service providers in limiting remedies against them for breaches of copyright. Schools, universities, libraries, archives and other organisations need the certainty provided by the safe harbour to engage in strategic planning, to invest in new technologies for the benefit of their users and to

ensure ongoing comprehensive, efficient internet services. The ability to exclude persons or classes of persons from the safe harbour scheme through Regulations will affect decisions to expend capital in developing, operating and maintaining IT systems in the future. Certainty of scope of the safe harbour is also essential in training and educating staff, students and other users on management of copyright risks.

Further, it is unclear whether the discretion to exclude persons from the safe harbour scheme would comply with the AUSFTA. The safe harbour scheme as set out in the AUSFTA is to apply to all who provide the services outlined in section 29(b)(i)(A) to (D) of Article 17.11, provided the service provider complies with the relevant conditions. The AUSFTA does not provide for the discretion to exclude a person or class of persons

The ADA and ALCC also note that a key policy rationale for expanding the application of the safe harbours is to encourage investment and innovation in Australia's digital economy. We submit that the inclusion of the ability to exclude persons from the safe harbours will have a chilling effect on this investment and innovation.

3 The safe harbour and activities of students and staff

The ADA and ALCC seek inclusion in the proposed safe harbour provision a provision to the effect of sub-section 512(e) of the DMCA for the benefit of not-for-profit educational institutions. Sub-section 512(e) ensures that these institutions may still have the benefit of the safe harbours in circumstances of copyright infringement by faculty members and students. We submit that the inclusion of a similar provision to the effect of sub-section 512(e) in the proposed safe harbour provision would take into account libraries and schools as "not-for-profit educational institutions."

The ADA and ALCC submit that the Australian government should introduce a 'best practice' safe harbour regime which provides maximum certainty for service providers, including universities, libraries, schools, cultural institutions and other private and public sector organisations, and which aims to place Australia in the most attractive position possible in terms of advancing the Australian digital economy.

The ADA and ALCC are happy to discuss this submission further with the Attorney-General's Department at their convenience. Please contact Ellen Broad, Copyright Law and Policy Adviser with any further queries.

Yours sincerely,



Professor Tom Cochrane
Chairman
Australian Libraries Copyright Committee



Derek Whitehead OAM
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About the Australian Libraries Copyright Committee (ALCC)

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee which represents the following organisations:

- Australian Library and Information Association
- Australian Government Libraries Information Network
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia

About the Australian Digital Alliance (ADA)

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that balances the interests of rights holders with the interests of users of copyright material.