



Australian Libraries Copyright Committee



Australian Digital Alliance

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28 January 2011

Review Secretariat

Convergence Review

Department of Broadband, Communications and the Digital Economy

GPO Box 2154

Canberra ACT 2601

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### **RE: DRAFT TERMS OF REFERENCE FOR THE CONVERGENCE REVIEW**

We welcome the opportunity to comment on the draft Terms of Reference for the Convergence Review, which has the potential to shape the future of how Australians access content.

The Background Paper is silent with regard to copyright issues, which are the biggest impediment to seamless convergence. We urge that in looking at communications regulation the Committee also consider copyright regulation as a central issue. Given the aim of the Convergence Review is to increase the access of Australians to content, it should look at both communications regulation, the system which controls the delivery of content, and copyright regulation, the system which controls how that content is then used. The communication regulations which are under review affect the delivery of the news, TV, radio and online content that all Australians consume. However, copyright regulation determines the underlying rights in that content and effectively dictates how it can be used, including whether some of the uses envisioned in the Background Paper are permitted in Australia or whether the delivery systems are able to operate in Australia with an acceptable level of legal risk.

The challenges copyright poses to convergence must be addressed in order to realise the full benefits of many of the technologies mentioned in the Background Paper, or there is a risk that the gains from convergence will be diminished by copyright placing restrictions on how content can be used. Copyright issues need not dominate or hamper the Review, but they should not be overlooked in so far as they are pertinent and intrinsically linked to convergence. The key areas of copyright that may impact on convergence are as follows.

## Safe Harbours

Many of the new content providers discussed in the Background Paper, such as YouTube and IPTV channels, do not have adequate legal protection in Australia from the safe harbour limitations to intermediary liability in the *Copyright Act*,<sup>1</sup> because the safe harbours only protect ISPs.<sup>2</sup> Thus, there is only a minimal benefit from updating communications regulations to encourage these content providers to deliver services if the legal risk to their operations from copyright infringement is too great.

The impact of limiting eligibility to ISPs means that many types of intermediaries that arguably should be protected by safe harbours, are not. Australian service providers have significantly larger legal risks than their overseas counterparts. This makes Australia a less attractive business option and results in less access to new and innovative technologies and cultural and educational goods and services. Australia's narrow and impractical safe harbour defences are a serious impediment to the growth of its digital economy and the uptake of convergence technologies.

## Flexibility of Copyright law

Many of the new consumer activities contemplated in the Background Paper are questionable under copyright. If consumers are not empowered by copyright law to undertake such activities, then the technologies and devices which facilitate those activities may not be made or sold in Australia.

Australia needs increased flexibility in its copyright law from a general fairness based exception. History dictates that Australia's regime of limited copyright exceptions, such as the fair dealing exceptions,<sup>3</sup> can never be comprehensive because they cannot keep pace with new uses of copyright material that are facilitated by technological developments. This can limit the ability of consumers to access new content and technologies. The best example concerns the now ubiquitous portable MP3 player. In 2006, a space shifting exception for music was introduced which allowed consumers to shift music between different formats and devices.<sup>4</sup> It was nicked named the 'iPod exception' after the dominant technology of the time. The exception did not cover the space shifting of movies because there were no portable devices capable of playing movies in 2006. However, in 2010, we see a proliferation of such devices, so arguably Australia now needs an 'iPad exception' to allow consumers to legally space shift DVDs.

The substantial time lag between new technologies which allow new uses of copyright content, and the legalisation of those uses by copyright law, demonstrates that if copyright is not updated and made more flexible in order to facilitate the new uses of content, then the availability of the technology will not have a meaningful impact on the lives of Australians.

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<sup>1</sup> *Copyright Act 1968*, Part V Division 2AA.

<sup>2</sup> See *Copyright Act 1968*, ss 10, 116AC, 116AD, 116AE and 116AF; and *Telecommunications Act 1997* ss 7 and 87.

<sup>3</sup> See *Copyright Act 1968*, ss 40-42 and 103A-103C.

<sup>4</sup> *section 109A*

## Licensing

Current worldwide licensing practices restrict the amount of legal online content that Australians have access to, such as the unavailability of Hulu, a hugely popular US online on-demand TV website.<sup>5</sup> There is also a discrepancy between prices consumers pay in the US to purchase digital content and prices paid in Australia – which can be 180% more expensive.<sup>6</sup> While the licensing of copyright material is not a copyright law reform issue, it poses a serious restriction on the ability of Australians to get legal access to online content that is propagated using convergence technologies.

Kind regards



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Chairman  
Australian Libraries Copyright Committee



Derek Whitehead  
Chairman  
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<sup>5</sup> <[www.hulu.com](http://www.hulu.com)>.

<sup>6</sup> See Rene Summer, 'Unleashing the benefits of technology advancements in the audiovisual media industry', Ericsson, 21 November 2010, p 25, comparing the cost of Beatles Masters, Vols. 1 & 2 on iTunes and the US and Australia.



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## **ABOUT US**

### **The Australian Digital Alliance**

The Australian Digital Alliance (ADA) is a cross-sectoral coalition founded to represent the public interest perspective in the copyright debate and to advocate for balanced copyright law. It represents universities, schools, ICT companies, individuals, galleries, libraries, archives and museums. All members of the ADA are united by the common principle that copyright laws must strike a balance between providing reasonable incentives for creativity on the one hand, and the wider public interest in access to knowledge for the advancement of learning, innovation and research on the other. The ADA is a respected and active participant in the Australian copyright debate with a high level of recognition from government, copyright holders and media.

### **The Australian Libraries Copyright Committee**

The ADA works closely with its sister organisation, the Australian Libraries Copyright Committee (ALCC). The ALCC is the peak consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It considers the impact of copyright law on its members, develops policy and provides an effective and unified voice for the sector. The ALCC advocates action to support the role of libraries as information providers and preservers, and the wider public interest in balanced copyright law. The ALCC is a cross-sectoral committee which represents all Australian libraries through the National Library of Australia and all State Libraries, the Australian Library and Information Association, the Council of Australian University Librarians, the National Archives of Australia and other representative organisations.