18 October 2005

Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General’s Department
Robert Garran Offices, National Circuit
Barton ACT 2600
AUSTRALIA

Dear Ms Daniels

REVIEW OF THE SCOPE OF PART V DIVISION 2AA OF THE COPYRIGHT ACT

Introduction

1. The Copyright Agency Limited (CAL) is a copyright collecting society that administers, on a non-exclusive basis, the copyright controlled by its members.

2. CAL is a not for profit company limited by guarantee.

3. CAL currently represents the reproduction rights of over 24,000 Australian authors and publishers. CAL also represents thousands of other copyright owners through reciprocal agreements with overseas collecting societies.

4. CAL has been declared by the Attorney-General to be the collecting society for the reproduction and communication of works by educational institutions under Part VB of the Copyright Act 1968 (the Act). CAL has also been declared by the Copyright Tribunal to be the collecting society for government copying for the purposes of Part 2 of Division VII of the Act.

5. Pursuant to these declarations, CAL administers statutory licences through which educational institutions and Commonwealth, State and Territory governments remunerate copyright owners for the copying of their works.

6. In addition, CAL offers voluntary licences to the public and corporations for the right to copy and communicate published works. As a single resource, CAL can provide copyright clearances for hundreds of thousands of books, articles and artistic works through its licences to copy.

7. CAL strongly supports legislative provisions in relation to copyright which will benefit all copyright owners and the community in Australia and internationally.
The online environment

8. CAL is concerned at the statement contained in 4.2 of the Issues Paper, that “As the internet is largely regarded as a free repository of information, freedom is given to the users to determine the content of various communications.” Many of CAL’s members are attempting to develop digital online markets for their works, and while the view of the internet as a ‘free repository’ may be shared by some, it is not the view of many of CAL’s members.

9. Works which are used by educational bodies and employers are often those for which the copyright owners do expect their copyright interests to be respected. Their works which they have put on the net have digital rights management tools applied to protect them against infringement, in addition to copyright notices. These notices and tools do not accord with the assumption of the internet as a ‘free repository’.

10. Therefore to base policy decisions on this assumption is to ignore vital parties in the online environment – those who create and own copyright works. This assumption is overly simplistic and ignores the efforts of authors and publishers to establish and develop new business models in the online environment. The effect of giving legislative authority to this assumption would be to undermine the interests of the Australian publishing industry, diminishing the incentive to create and invest in new works, and reducing the number of works available to the public. This is clearly contrary to public interest.

Definition of Carriage Service Provider (CSP)

11. CAL understands that the Attorney-General’s Department is reviewing the definition of a CSP in the Copyright Act, with the particular objective of determining whether the definition should be altered to encompass a broader group of entities. In considering a possible increase in the scope of what is considered a CSP, obligations contained in Australia’s Free Trade Agreement with the US must be taken into account.

12. Definitions under different legislative instruments should be consistent. The adoption of different definitions for the same word or phrase under different pieces of legislation leads to confusion for all parties and less likelihood of compliance with provisions. Therefore to have one definition under the Telecommunications Act and one under the Copyright Act is not desirable.

CSP Definition and Educational Institutions

13. CAL is aware that the educational sector – specifically universities – have requested that the definition of a CSP be broadened to cover them as bodies which carry out the four categories of activities contained in ss.116AC to 116AF.

14. Carriage service providers are protected by the safe harbour provisions contained in Part V Division 2AA of the Copyright Act. While universities may undertake the activities described in ss. 116AC – AF, it is CAL’s view that carrying out these activities does not necessarily mean that these institutions should be classified as
and eligible for the same legal treatment as ISPs as defined under the
*Telecommunications Act.*

**Difference between educational institutions and ISPs**

15. While CAL agrees that universities undertake all four of the categories of activities contained in these provisions, which are covered by the safe-harbour scheme contained in Part V Division 2AA, CAL believes they are not the same as ISPs as defined under the *Telecommunications Act.*

16. The most important difference between ISPs and Universities (and other educational bodies) is the relationship they have with their users – teachers, other employees and students. That relationship alone means that educational institutions cannot be regarded as mere providers of access to online facilities.

17. As discussed in the Issues Paper, the rationale behind providing ISPs with safe-harbour provisions was to provide protection against infringement liability to entities ‘where they had no control over the actions of their end users.’ This is not the case with educational bodies – they exercise great control over the use of their staff and students make of the online facilities they provide. In fact, it is part of the universities’ pedagogical function to make available, provide, direct to and require students to access particular information relevant to the disciplines being taught.

18. This control exercised over digital use of works through facilities offered by educational institutions is comparable to the control which the same institutions exercise over analogue facilities. The facts which led to a finding of the authorisation in the landmark *Moorehouse* decision are instructive on this point:

> The University had the power to control both the use of the books and the use of the machines. In the circumstances, if a person who was allowed to use the library made a copy of a substantial part of a book taken from the open shelves of the library, and did so otherwise than by way of fair dealing for the purpose of research or private study, it can be inferred that the University authorized him to do so, unless the University had taken reasonable steps to prevent an infringing copy of that kind from being made.¹

19. Pedagogical practices are changing to self-paced learning as opposed to direct provision of specific materials, and this comes under the concept of control contained in the excerpt from the *Moorehouse* case extracted above. For example, a teacher may tell students to access a particular site and answer a set of questions, or they may ask students to research a particular author or artist using online facilities.

**Potential conflict between Part VB and an expansion of the CSP definition**

20. Of particular concern to CAL is the potential conflict between the operation of the Part VB statutory licence and the possible expansion of the safe-harbour scheme to cover educational institutions. Various activities which are covered by the safe-harbour scheme are currently the subject of litigation between CAL and schools.

¹ University of New South Wales v. Moorhouse [1975] HCA 26; (1975) 133 CLR 1, at p. 14
21. For example, caching (Category B activity, referred to in s 116AD) and referring users to an online location (Category D, referred to in s 116AF), are currently before the Copyright Tribunal to determine whether these activities constitute remunerable reproduction usage of copyright works under Part VB.

22. The intention of Part VB is that by notifying CAL, the educational institution undertakes that it will copy for educational purposes in reliance on Part VB. When relying on Part VB it has responsibilities and associated requirements – such as keeping records and payment of remuneration. Where staff or students use an institution’s facilities outside the Part VB scheme, educational institutions regulate that use through guidelines, just as employers’ exercise control over their employees’ use of online facilities.

23. It is not clear how Part VB would operate if educational bodies were given the status of CSPs for the purposes of benefiting from the safe-harbour provisions.

24. Additionally, CAL is not aware of educational bodies in the US being granted CSP status for the purpose of obtaining protection under a safe harbour scheme for the actions of the students, teachers and staff to whom they provide access to online facilities.

Other bodies and CSP definition

25. CAL would have similar concerns about other entities which provide online facilities to parties who are more closely tied to them than the relationship which exists between ISP and customer.

26. Employers do not usually allow unfettered access to the internet to their staff. Staff are often directed to refrain from using their employer’s online facilities other than for employment related purposes, and are directed by their employers to access a list of specific websites only, and have access to others blocked.

27. Where an employer directs a staff member to access and copy material which would constitute an infringement, CAL can see no persuasive policy justification for providing them with the benefit of safe harbour provisions. This would preclude copyright owners from being able to sue for damages, account of profits, additional damages or other monetary relief." (s. 116AG(2))

28. I thank you for the opportunity to provide comment, and look forward to hearing of developments.

Yours sincerely

Michael Fraser
Chief Executive