Response to Attorney-General’s Department Consultation Paper
Revising the scope of the ‘safe harbour’ scheme

25 November 2011

Thank you for the opportunity to respond to the Attorney-General’s Department Consultation Paper on whether or not the ‘safe harbour’ provisions for carriage service providers should be extended to other service providers.

About Copyright Agency

Copyright Agency Limited is a non-profit company that collects, and distributes to rightsholders, copyright fees and royalties for the use of text and images, including uses of digital content. Our members include writers, artists and publishers.

We are appointed by the Australian Government to manage the statutory licences in the Copyright Act for educational and government use of text and images, and the artists’ resale royalty scheme. We also license our members’ works for use by corporations, local governments and others.

We are a member of the Australian Content Industry Group, and have been involved in discussions with internet service providers aimed at establishing an industry code for the management of unauthorised filesharing. We are also a member of the Australian Copyright Council.

Online service providers’ control over client behaviour

The Consultation Paper describes the safe harbour scheme as limiting the remedies against carriage service providers for copyright infringements that they do not ‘control, initiate or direct’. With respect, this does not seem to us an accurate description.

While they may not initiate or direct the infringements covered by the scheme, they do, of course, have the means to control them. The safe harbour scheme is intended to provide an incentive for them to exercise that control in a number of specified ways.

They are also able to exercise control in ways not specified as part of the scheme, such as requiring their subscribers, in their subscriber agreements, to comply with copyright law, and taking action if subscribers breach those provisions.

Responsibility of intermediaries

At a conference earlier this year, the Director General of the World Intellectual Property Organization, Dr Francis Gurry, referred to ‘sharing responsibility for cultural policy’ to address the ‘threat to the financial viability of culture in the 21st Century’.

1 There are express references to carriage service providers’ control in the safe harbour provisions: for example, sections 116AB, 116AE (Item 4, Categories C and D)
Intermediaries such as online service providers have an integral role in that shared responsibility.

The extent and nature of that responsibility under current copyright law is established by a number of different provisions in the Copyright Act, including sections 36 and 101 (liability for authorisation), section 22 (liability for making a communication), sections 39B and 112E (exemption for mere provision of facilities), and the case law relating to those provisions.

Reviewing the extent to which intermediaries should be responsible, and the mechanisms for giving effect to that responsibility, necessarily entails consideration of all the applicable laws and practices.

**Case for extension of the safe harbour provisions**

The purpose of the safe harbour provisions is to encourage behaviour that contributes to the realisation of the objectives of copyright.

The issue here is whether the objectives of copyright – to promote culture and innovation – would be advanced by extending the safe harbour provisions.

While we are familiar with rhetoric regarding the promotion of innovation through the limitation of copyright law, the evidence that an expansion of the safe harbour scheme would promote innovation and cultural output in Australia seems to be missing.

We note the response in the recent UK Hargreaves report to similar assertions made in arguments for the introduction of a fair use exception in the UK:

> Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law.\(^3\)

**Cooperation**

Content owners remain ready and willing to cooperate with service providers to develop solutions to manage unauthorised use of content and encourage the use of authorised content.

We are not clear about the perceived impediments to cooperation that online service providers are seeking to overcome through extension of the safe harbour scheme. We are concerned that there is assumption that extension of the safe harbour scheme is a necessary precondition for cooperation when the case has not actually been made out.

Any review of the safe harbour provisions must, we think, assess:

- actions to cooperate with content owners taken to date by each class of service provider seeking the benefit of the extension;
- what, if any, impediments there are to further cooperation; and
- whether those impediments are best addressed, in terms of meeting the objectives of copyright policy, through the mechanism of a safe harbour scheme.


Educational institutions

We share the concerns raised by Screenrights about the inference from the Consultation Paper that the safe harbour provisions might be extended to educational institutions.

We are not aware of the issues educational institutions are seeking to address through the mechanism of safe harbour provisions, and we are not clear about how the lack of a safe harbour in this context is an impediment to educational institutions’ cooperation with content owners. We ask that those issues be articulated so that we have an opportunity to assess ways in which they might be addressed.

Consideration by Australian Law Reform Commission

The extent to which the safe harbour provisions are the right mechanism for bringing about cooperation by online service providers with content owners is an issue best dealt with by the Australian Law Reform Commission in its inquiry into copyright scheduled for 2012. This is not an issue that can be properly considered in isolation, and it involves a range of matters that are not canvassed in the Consultation Paper.

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