27 April 2012

Response to draft terms of reference for inquiry into copyright by Australian Law Reform Commission

Thank you for an opportunity to comment on the draft terms of reference for the forthcoming inquiry into copyright by the Australian Law Reform Commission (ALRC).

About Copyright Agency
Copyright Agency is a non-profit rights management organisation, whose members include writers, artists and publishers. We have been 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, as their non-exclusive agent, for a range of uses by corporations, local governments and others.

Our response
The draft terms of reference provide a useful context for the inquiry, including by articulating the objective of copyright law: to promote the production of original copyright materials. The creation of new material is not, however, an end in itself: the ultimate objective is the contribution of that new material to Australian society as a whole, including its culture, ideas and economy.

Value of creative work
The Spicer Committee, in its 1959 report preceding the current Copyright Act, described the purpose of copyright law as follows:

The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works.

An important aspect of copyright law is recognition of the value of the creative work to others. This is not only the value of the time and effort saved by a person who uses another’s work rather than creating their own, but also the value of the skill, talent expertise of the creator that the user lacks.

Facilitating an environment of culture and innovation
While the rhetoric of ‘balance’ between creators and users of content is widely used, we think it is an unhelpful way to approach the policy issues. This is partly because people can be both creators and users of content, including through building on and enhancing the work of others – often
referred to as ‘prosumers’ when this occurs in the online environment. It also fails to recognise the role of intermediaries, and the benefits to them from content created by others.

We suggest a better approach is to review the environment created by copyright law and its implementation, and how it can best promote the creation of new material for benefit of Australian society as a whole. Such a review needs to take into account all those affected, including those reliant on the copyright system to create new material, those who invest in the creation of new content, those who are amateur (rather than professional) creators, those who have built businesses based on amateur content (for example, based on advertising or sale of data), and those who benefit in various ways from the content created by others.

The role of intermediaries and the notion of ‘non-commercial’

While a distinction between ‘commercial’ and ‘non-commercial’ use is often made, it is harder to draw in an environment where intermediaries such as online service providers are deriving commercial benefits from content created by amateurs. While that may be unproblematic for the original content created by amateurs themselves, provided they are clearly informed about the commercial benefits others are deriving from their work, it becomes problematic when they incorporate other people’s content in theirs.

Streamlined clearance processes through technological advances

Technological developments continue to provide new opportunities for more streamlined ways to enable uses of content on an equitable basis, having regard to the roles of all those involved. These are being developed within the current framework, and it is not clear the extent to which (if any) they require legislative change.

Relationship between context for inquiry and focus on exceptions

While perhaps not intended, the drafting of the terms of reference suggests that the only area of copyright that needs to be reviewed for the digital environment is exceptions. We acknowledge that the terms of reference allow for arguments that existing exceptions are too broad in some areas given technological and other developments, but we think that it would be unfortunate if exceptions were to be perceived as the only area requiring review.

Expectations of users and the public

While we acknowledge that there can be a case for reviewing laws that are not followed in practice and do not reflect current norms in some areas of society, attitudes and practice can result from ignorance not just of a law but of the reasons for it. It is the government’s role to explain to the Australian public how its copyright law and policy benefits Australian society as a whole.

Thank you again for an opportunity to comment on the draft terms of reference, and we look forward to participating in the inquiry.

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