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The Department of Broadband, Communications and the Digital Economy  
Canberra City ACT 2601

## ***Digital Economy Future Directions: Consultation Paper***

### ***Introduction***

As an organisation representing the collective copyright interests of over 13,000 Australian authors and publishers, and providing access to their material to a similar number of licensees, Copyright Agency Limited (CAL) takes great interest in the review being undertaken by Government.

CAL's members and licensees recognise that the digital environment is a current reality. Our members are in the process of adapting business models and developing new digital content and delivery mechanisms in response to this developing section of the publishing industry. They are also urgently aware of the need for skills development of their staff.

Australia's publishers and authors recognise that the digital environment presents both opportunities and risks. The common requirement of our members is that Australia's regulatory framework should provide them with the confidence to invest in the production of digital works.

### ***Open Access to Public Sector Information***

As CAL has stated in previous submissions to government<sup>1</sup>, this area is of particular relevance to CAL's membership. Many of our members are public sector bodies and many CAL members use Public Sector Information (PSI) to create value-added products as reference tools for the government generated information to which they relate. The sorts of works which are relevant here are statutory instruments, guidelines, standards and other documents relied upon by the professional and educational sector.

PSI is of many kinds. Often it is personal information as recognised in the discussion paper and subject to privacy laws. This example highlights the

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<sup>1</sup> CAL made submissions on this topic to the Copyright Law Review Committee (CLRC) review of the law relating to government ownership of copyright material, which resulted in the 2005 CLRC Crown Copyright Report, and to the 2008 Review of the National Innovation System undertaken by the Department of Innovation, Industry, Science and Research.

importance of considering what category of PSI are being referred to when determining upon what terms they should be made available to the public.

PSI may also be copyright to others. For example, CAL notes the lengthy reference to mapping/ geo-location databases in the Consultation Paper. A recent High Court judgment<sup>2</sup> in relation to CAL's surveyor members affirms these authors' copyright in the survey maps and plans they create. Survey maps are the result of skill, labour and time surveyors invest in their creation. If there is thought to be a public interest in making these maps and plans openly accessible, the economic rights of surveyors should be taken into account.

CAL submits that clarification of what works are 'government generated' is necessary, as is economic analysis of different models for offering different categories of government works to third parties.

The Copyright Law Review Committee's 2005 review of Crown Copyright provisions underscored the difficulties in determining which works are 'government generated' for the purposes of copyright, and therefore ones to which any legislative provisions would apply which would create open access to them.

The CLRC's 2005 review made clear that this issue was one of debate between the different arms of government – States claiming that the Commonwealth was not in a position to overwhelm their prerogative copyright interests, with some judges asserting that they retained copyright in their judgments. CAL believes clarification of these areas would be of benefit to all.

Economic analysis might favour a 'user pays' model for some categories of PSI. To the extent to which any material is valuable, and a market develops to establish its value, there is less need for tax payer funds to be spent on the creation of these works.

### ***Licensing or other mechanisms for creating open access to PSI***

CAL supports the objective of public access to government works. However, methods for achieving 'open access' are varied and careful consideration should be given before a model is adopted.

Again, this is an area that was considered by the CLRC into Crown Copyright. Some of the reasons that a blanket removal of copyright from government published works was not supported in that review remain relevant. There is concern that without copyright protection, third parties could publish commercial (or non-commercial) versions of government works which are not accurate, and which therefore do not provide the public with access to authorised government information. Copyright in this context can be used to exercise quality/ accuracy control.

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<sup>2</sup> Copyright Agency Limited v State of New South Waies [2008] HCA 35

One of the key marketed benefits of Creative Commons licensing is the ability of consumers to 'reuse' content in whatever ways they wish, usually on the basis that they will attribute the creator of the work they have reused, and offer it on similar terms – i.e. with a requirement for attribution, but no economic return where the reuse is non-commercial. There is no requirement for accuracy in the 'reuse' made. Government would not be able to renegotiate the terms of CC licences after a set period as they are drafted to endure for perpetuity.

Some governments have therefore determined that rather than removing copyright from works or offering government works on CC or other open licensing terms, a partial waiver of copyright over government works is more appropriate. These waivers usually permit non-commercial use of works – say for download and reproduction of works in a classroom or a work-place to ensure awareness of government policies and laws. Most provide that where commercial use is to be made of government work, say by commercial publishers, licence terms must be negotiated with government. Some examples of these waivers are those used by parts of the NSW government, and the UK government.

Some confusion will arise if government applies open licensing models to its works. The confusion relates to those users of such works who do not appreciate that whatever copyright licence is applied to government works, does not apply to the commercially produced publications which reproduce these government works. These are works such as annotated statutes which contain detailed cross-referencing, glosses and other analyses which are distinct from the unembellished government works on which they rely. To remove any confusion in relation to the application of any government work copyright open licence, the UK government has clarified that its waiver over government works does not extend to these commercially published, value added products.

### ***Digital Confidence***

CAL believes that for businesses, including those engaged in the publishing industry, to invest in the creation and dissemination of digital content they must have access to world standard digital infrastructure.

This includes the development of secure online trading facilities and training for those engaged in these areas.

A critical part of this, in CAL's view is the regulatory framework which supports online trade, including the laws relating to copyright content and its protection in the online environment.

In relation to practical concerns of those engaged in publishing in Australia, in 2008 CAL and the Australia Council commissioned Bloom Partners to review how Australian publishers are responding to the challenges of publishing in the digital environment, and what support they believe they require. Bloom partners surveyed and interviewed publishers and others involved in the

Australian publishing industries to conduct their review. The review considered professional development needs, desire for an industry co-ordinated approach to address the challenges of digital publishing, and by whom that might best be driven, and the value of a centralised digital publishing portal.

The conclusions of the Bloom report were that Australian publishing in the digital environment is at a critical point where decisions made now will determine its future viability. If Australia positions itself effectively, business and government can maximise its efficiency and take full advantage of digital developments.

What became abundantly clear from the Bloom Partners review was that Australian publishers and authors want and need training in online provision of works, including how to harness digital technology to enable them to participate in the digital economy. This training needs to be undertaken at an industry level – coordinated by the relevant industry bodies – such as the Australian Publishers Association.

In addition, Australia will need to ensure that we adopt internationally accepted digital identifiers, such as the ONIX system, and ACAP (Automated Content Access Protocols) to provide efficient and secure facilities for the trade in works. This will require industry awareness through training and communications offered to industry participants.

A great concern for Australian publishers surveyed was that Australia should not fall behind our foreign counterparts, especially the US, where they perceive better developed and supported publishing industries.

### ***Ensuring Australia's regulatory framework enables the digital economy.***

CAL's members are authors and publishers of copyright works. Surveys of their attitudes towards the digital environment in 2003 demonstrated a reluctance to invest in the creation and dissemination of digital content because they did not feel the Australian regulatory framework provided them with adequate security. Some of these concerns have been addressed through the more stringent provisions in relation to copyright in the digital environment contained in the 2005 US-Australia Free Trade Agreement.

Apart from the extension of the duration of copyright in Australia by twenty years to endure for 70 years after the death of the author of a work, these amendments brought Australia's copyright regime up to the minimum requirements contained in the World Intellectual Property Internet Treaties of 1996. The important amendments for our members relate to the legislative protection given to the technological protection measures which they apply to their works, and a limitation of the circumstances in which they are able to be legally circumvented without the direct permission of the copyright owner. The other important development for CAL's members were the provisions regulating carriage service providers and the safe harbour provisions under

which they can shelter from liability for infringement which occurs on their networks.

Australian investment in the innovative industries driven by the internet will require that these laws are not undermined.

### *Safe Harbours*

CAL notes suggestion that the *Safe Harbour* provisions contained in the *Copyright Act* be extended to cover not only internet service providers, but others engaged in internet businesses – especially social network sites. CAL is also aware of the desire of some educational institutions to be able to shelter under these provisions.

CAL provided comment to the 2005 *Review of the Scope of Part V Division 2AA Of The Copyright Act*. Our comments then were in response to universities' desire to have the definition of carriage service providers (CSPs) expanded to capture them.

CSPs are protected by the safe harbour provisions contained in Part V Division 2AA of the *Copyright Act*. While social network sites and 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 entities should be classified, and eligible for the same legal treatment, as ISPs as defined under the *Telecommunications Act*.

CAL believes there are some fundamental differences between these entities and ISPs as defined under the *Telecommunications Act* which mean that they should not be able to benefit from the safe harbour provisions of the *Copyright Act*.

The most important difference between ISPs and educational institutions and social network sites is the relationship they have with their users. Neither educational institutions nor social network sites can be regarded as mere providers of access to online facilities.

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 or social network sites – they exercise great control over users 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.

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 *Moorhouse* 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.<sup>3</sup>

Similarly, social network sites post detailed terms for users who post materials to the sites they run. They actively moderate content displayed on their websites.

### ***Conclusion***

We submit that very close consideration of the impact of any licensing provisions or other policy decisions for the treatment of PSI must be undertaken, to ensure that there are no unintended consequences which might constrain and detrimentally affect Australian creators' ability to innovate and participate in the digital economy.

CAL congratulates government on this timely review of an area which is critical to Australia's innovative future. We are pleased to meet with government to discuss any issues raised in our submission or to provide any further information which is of interest to government.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jim Alexander', with a large, sweeping initial 'J'.

Jim Alexander  
Chief Executive

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<sup>3</sup> University of New South Wales v. Moorhouse [1975] HCA 26; (1975) 133 CLR 1, at p. 14