

AVSDA

Australian Visual Software Distributors Association Ltd

20 February 2009

Department of Broadband, Communications and the Digital Economy
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AVSDA was provided an extension for this submission to 20th February 2009.

1. Introduction

The Australian Visual Software Distributors Association (AVSDA) welcomes the opportunity to provide this submission in response to the *Australian Government's Digital Economy Future Directions Consultation Paper* (the Paper).

AVSDA acknowledges the importance of technological developments and the potential benefits to be derived from the development of internet and mobile channels for legitimate content delivery. AVSDA also acknowledges the scope for new and innovative legitimate digital content distribution channels as broadband speeds increase. Ultimately, new modes of delivery amount to new ways that AVSDA's members can distribute their content to consumers. AVSDA is, however, mindful of the need to balance the often competing interests of content providers, distribution platforms and customers in the digital economy.

The Paper invites input and comment on a range of issues. AVSDA's submission is limited to the issue of most moment to its members, namely '*Should the existing copyright safe harbour scheme for carriage service providers be broadened?*' (page 8 of the Paper) and comments on the classifying of content in the digital economy and suggests reform is required.

We have had the benefit of reading the submissions of both the Australian Federation Against Copyright Theft Limited (AFACT) and the International Intellectual Property Alliance (IIPA) and agree with the arguments both organisations have made for not expanding the safe harbour scheme.

2. About AVSDA

AVSDA was formed in 1983 to represent the interests of owners of copyright in, and distributors of, videos in Australia. The video market is now 99% using the DVD format. In 2007, AVSDA members moved over 95 million titles worth \$1.347 billion in wholesale sales. According to ABS data, the entire film and television production and distribution industry in Australia employs directly or indirectly over 50,000 people.

The Association speaks and acts on behalf of its members on issues that affect the industry as a whole such as censorship, film piracy, technology challenges, free trade, copyright and enforcement.

AVSDA lobbies government stakeholders, responds to government enquiries by submissions, seeks amendments to legislation, and when appropriate works with other copyright industries to affect change. AVSDA also commissions industry research from time to time to gauge Australian consumer attitudes to our industry - an industry which is currently going through a period of constant change led by changes in technology.

AVSDA currently has 16 members who range from all the major international film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment and Madman Entertainment.

AVSDA also engages with the Government and its agencies to reform and streamline the National Classifications Scheme to ensure that it meets current technological developments and distribution requirements.

AVSDA is also proud to support the Starlight Children's Foundation.

More information can be found at www.avsda.com.au

3. Should the existing copyright safe harbour scheme for carriage service providers be broadened?

The Paper states that the current scheme does not apply to all types of online service providers such as User Generated Content (UGC) websites. Such sites include websites such as YouTube, MySpace, Facebook and the many other websites that are highly dependent on user-generated content. The Australian Government has asked whether the current scheme should be broadened to afford UGC websites with the same protections as carriage service providers (CSP).

Outlined below are reasons why the current safe harbour scheme should not be broadened.

3.1. Extension of the safe harbour scheme is not warranted on the available evidence

There is currently no evidence that indicates that an expansion of the safe harbour scheme to include UGC websites in Australia is warranted. We are not aware that, given Australia's population and other market characteristics, there is any deficit in the number of local UGC platforms, let alone any deficit related specifically to the scope of Australia's safe harbour scheme.

It is submitted that as a precursor to any proposal to extend the safe harbour scheme, it is incumbent on advocates of such extension or on Government to clearly establish that the proliferation of localised UGC platforms in Australia is materially behind other like countries and, if it is, that such lag is a direct result of the scope of Australia's safe harbour regime.

The Government should not extend the safe harbours scheme to placate the individual proprietors of UGC platforms who seek to use it as a bargaining chip in bringing their operations to Australia. The proper course is to make a 'whole of market' assessment of the consequences of any proposed change.

3.2. The United States model offers a poor comparison

We understand that the suggested amendment may be motivated by a desire to synchronise the Australian safe harbour provisions with those in the United States, where some protection is afforded to a category of service providers which is broader than the category of CSPs afforded the benefit of safe harbours under Australian law.

There are significant differences between the U.S. scheme and the current Australian scheme that should be considered before any move to adjust the current balance of competing rights between content owners and the proprietors of distribution platforms.

For instance, the U.S. scheme does not have an equivalent to provision to s112E of the Copyright Act, which provides a defence to a claim for authorisation infringement for all manner of service provider, for the mere provision of facilities to copyright infringers.

Conversely, a service provider who may be entitled to the benefit of a safe harbour under the U.S. scheme has an obligation, if compelled by a copyright owner, to furnish the identity of alleged copyright infringers (which incidentally would raise a whole range of privacy issues under Australian law). There is no equivalent provision in the Australian scheme. In fact CSPs are not required to disclose the identity of an alleged infringer even after a copyright owner has issued a takedown notice.

We submit that, subject to satisfying its international obligations (which subject is addressed below); there is no reason why Australia should extend the safe harbour scheme with reference to the U.S. model per se. Rather the matter should be considered in light of the rights and obligations of Australian stakeholders under the current regulatory regime.

3.3. *Current scheme satisfies treaty obligations*

The current Australian safe harbour scheme was introduced following the negotiation of the Australia United States Free Trade Agreement (AUSFTA). The Australian Lead Negotiator, Intellectual Property, Ms Toni Harmer, has previously stated that the implementation of AUSFTA by Australia will “be informed by some of the issues that the US have encountered domestically” and that “we do not have to do it exactly the way they do it”¹.

It is our submission that the current safe harbour scheme satisfies our obligations under AUSFTA and therefore there is no need to broaden the safe harbour provisions.

3.4. *The Scope of Required Change*

The purpose of the current safe harbour scheme is to provide a greater measure of certainty for ISP's² and Div 2AA of the Copyright Act is drafted accordingly. The expansion of the safe harbour provisions would necessitate numerous textual and substantive legislative amendments. Such changes would necessitate adjustments to the following:

- (a) The definition of “financial benefit” in section 116AH, which makes reference to the “industry practice in relation to the charging of services by carriage service providers, including charging based on the level of activity”.
- (b) The special presumption of compliance with the scheme in favour of ISPs set out in section 116AI.
- (c) The Copyright Regulations, which refer to CSPs and are aimed at the activities of ISPs.

Whilst the need for these and other changes is not reason itself for not extending the current scheme, it does highlight that such extension is far from a simple exercise and would require a wholesale review of the current provisions.

We would also add that the extension of the scheme is not necessarily a guarantee of certainty in this area. The U.S. scheme is currently marred by a spate of litigation which on one view is a result not as a result of any lack of clarity on the legislature's part, but because of the stakes involved for the litigants. Indeed there is currently litigation on foot in Australia which, as we understand it, touches on the current safe harbours scheme, notwithstanding its clear parameters.

3.5. *An alternative – Fostering a Cooperative Environment*

It is AVSDA's view that rather than seeking to extend the safe harbours scheme, the Australian Government should aim to create an environment that encourages cooperation between ISPs, UGC websites and content owners, through say, a workable Code of Conduct. Content owners depend on the internet for consumer awareness and growth, while UGC websites depend on content owners to develop and produce content that will attract users to their website. These groups are highly dependent on each other therefore an environment that facilitates the various group interests should be encouraged. It is our submission that the broadening of the safe harbour scheme may merely provide the new forms of online service providers with a layer of unnecessary protection that will further distance the prospects of having a cooperative environment.

¹ Transcript of hearing before the Joint Standing Committee on Treatise, 2 April 2004

² Mr Stephen Fox Principal Legal Officer of the Copyright law Branch of the Attorney-General's Department. Transcript of 2 April 2004 before the Joint Standing Committee on Treaties.

4. The Digital Economy consultation and reform process should also include reforming the National Classifications Scheme

The Paper asks a number of important questions about Government enhancing and fostering innovations, facilitating the adoption of online business models and content to ensure “digital confidence” among both industry and consumers.

On 3 November 2008 AVSDA wrote to the Minister for Broadband, Communications and the Digital Economy (see Attachment A to this submission) proposing the need to consider reforms to the Australian classifications system. In that submission AVSDA suggests reforms would lead to the following improved outcomes:

- Greater industry compliance of the current classification system we have in Australia;
- Greater awareness by the consumer and consistency of classifications markings and consumer advice across different channels; and
- Making it easier for industry to understand and comply with Australian classifications rules thereby not driving content to be hosted off-shore to circumvent local laws.

AVSDA believes that the Australian Government needs to modernise from the current ‘analogue’ Australian classification regime as it currently fails to meet the needs of both industry and consumers. Digital content available at the same time across multiple platforms or channels gives the Australian consumer greater choice than ever before but the various classification systems governing the different channels but same content differs markedly which leads to sub-optimal outcomes.

AVSDA submits that policy development and reforms involving the Digital Economy should consider the classifications system. It is pleasing that the response to the letter from the Office of the Minister for Broadband, Communications and the Digital Economy indicated that “*the Government recognises that there are certain challenges that exist with the current approach*” and look forward to working in partnership to development appropriate policy responses.

Kind regards



SIMON BUSH
CEO
AVSDA

Attachment A: Submission on classification reform to the Minister

3 November 2008

Senator the Hon Stephen Conroy
Minister for Broadband, Communications and the Digital Economy
Parliament House ACT 2600

Dear Minister,

Digital media, convergence of content and channels and the classification system

As the Minister for Broadband, Communications and the Digital Economy you have responsibility for the Commonwealth's Broadcasting and Telecommunications Acts which in turn govern the way content is distributed to Australian consumers over the television networks (free-to-air and subscription), the internet and over mobile devices.

All digital content that is disseminated from within Australia to Australians must contain certain classifications guidelines and advice to Australian consumers, especially parents and children. We have now reached a place in time where content is truly convergent in that it can be accessed and viewed at the same time across multiple platforms which are governed by different Acts of Parliament and therefore different classification systems and regimes.

However, your Department and the Australian Communications and Media Authority (ACMA) does not have policy responsibility for the Classifications Act which sits with your colleague the Attorney-General and the Minister for Home Affairs Hon Bob Debus MP which governs all theatrical films, films and TV shows on DVDs, games and certain printed materials.

The Australian Visual Software Distributors Associations (AVSDA) represents the \$1.3 billion Australian home entertainment film industry which is almost entirely made up of digital copies of films on DVD or the new high definition standard of BluRay. Members include Roadshow Entertainment, Buena Vista, Universal, Paramount, Sony, Twentieth Century Fox, Warner Home Video, Icon, Madman Entertainment to name a few covering Australian independent distributors and the major Hollywood Studios. Television content available on DVD boxed sets has seen incredible growth over the past few years and will continue to drive both the growth in DVD sales but also in investment and production of quality Australian content moving forward.

The reason for this correspondence is that I believe that the Australian Government needs to modernise the classification regime that exists in this country which at the moment does not meet the needs of neither industry nor consumers. Digital content available at the same time across multiple platforms or channels gives the Australian consumer greater choice than ever before but the various classification systems governing the different channels but same content differs markedly which leads to sub-optimal outcomes.

I understand that you recently held a Digital Economy 2020 Summit where you brought together a cross section of participants and thought leaders involved in the broader digital economy. As a non-participant I am unsure whether the issues I raise in this letter was discussed in any way.

An example of the current fragmented system is as follows:

- A free-to-air TV network broadcasts a TV show episode (self-regulatory regime under the Broadcasting Act governed by ACMA);
- The same TV show is available to be downloaded and watched from the TV network's website directly following the broadcast (self-regulatory regime under the Telecommunications Act governed by ACMA);
- The same TV show is available to be watched via a mobile phone or other mobile device (self-regulatory regime under the Telecommunications Act governed by ACMA); and
- The TV show is made available on DVD format (governed by the Classifications Act and administered and approved by the Office of Film and Literature Commission).

A similar scenario applies for films whereby different Acts and classifications systems apply whether it is available for viewing on TV, the internet, the cinema or on DVD.

The sub-optimal outcomes I believe of the current system include:

- Confusion by industry and the consumer over the entire classifications system and which system applies at any given time depending on how the same content is packaged;
- Lack of consistency in classifications and consumer advice from one channel to the next – obviously this is perhaps one of the worst outcomes if consumers are left confused;
- Different classification ratings and advice can be given to the same content on different channels (ie differing from when shown on TV to the rating the OFLC may apply);
- Cost to industry in managing different regimes and systems for classification and potential for industry to inadvertently make a mistake due to the confusing nature or simply not comply; and
- Any attempts by policy makers to make the regime more confusing or onerous could lead to content being moved off-shore to circumvent Australian domestic laws but still make the content available to Australian consumers (principally over the internet)³. Sadly, this has already occurred.

AVSDA members mostly have to comply with the Classifications Act and the time consuming and expensive OFLC processes but increasingly the Broadcasting and Telecommunications Acts and their guidelines regarding content is becoming more relevant.⁴ Only last month, Australia became one of the first markets in the world where DVD distributors are making available a second digital copy of a film when they purchase a DVD where the digital copy is accessed by a key and unlocked over the internet which enables the digital content to be moved in an electronic file format to multiple devices and stored on hard drives without breaking any copyright or intellectual property laws.

AVSDA believes that a true Australian National Classifications System should be homogenous and consistent across channels making it easy to understand and comply with by both industry and Australian families and consumers. The current fragmented system does not achieve this and without reform will only get worse.

³ Noting the policy making process of the former Howard Government regarding the regulation of content over the internet and specifically the age verification device policy which in AVSDA's view, as indicated by its submission to government at the time, led to poor policy outcomes with unintended consequences which was left to ACMA to implement (which to its credit did so sensibly and smoothly).

⁴ According to the latest available annual report from the OFLC, in 2006/07 the category which covers DVD applications for assessment, Film – Other, accounted for over 4,600 applications or around 80% of the total OFLC workload. The OFLC received in this same period almost \$7 million in fees from industry to have content classified.

An easy to understand and consistent self-classifying of content, under an appropriate regulatory regime as already exists under ACMA, would lead to:

- Greater industry compliance of the current excellent classification system we have in Australia;
- Greater awareness by the consumer and consistency of classifications markings and consumer advice across different channels; and
- Making it easier for industry to understand and comply with Australian classifications rules thereby not driving content to be hosted off-shore to circumvent local laws.

Minister, due to the fast pace of digital technology evolution and how it is used to provide content to consumers, now is the time to update the Australian Classification System and move it away from the 35 millimetre theatrical print and printed press days to create a seamless digital system for a digital age. The current system was simply not designed for the modern reality of a film being released simultaneously at the theatre, on subscription TV, over the internet and on mobile devices.

I don't believe aligning and updating the system would be a difficult process as the systems exist at present to leverage through ACMA industry codes of conduct to generate a new model for Australia. The benefits to industry and importantly to the consumer that will flow from a new system should make it acceptable to the most conservative of political forces and the Senate and should even be applauded.

As a first step, I would welcome the consideration of a roundtable bringing together industry and government to progress this issue and provide options to the Government and you as the Minister. I would also be happy to provide details of who may be appropriate to attend such a roundtable given my understanding of the industry and issues involved.

Yours sincerely,

SIMON BUSH
Chief Executive Officer