Australian Government

Attorney-General's Department

REVISING THE SCOPE OF THE COPYRIGHT 'SAFE HARBOUR SCHEME'

Consultation Paper

October 2011

INTRODUCTION

The Government is pleased to release this consultation paper outlining proposed amendments to Part V Division 2AA of the *Copyright Act 1968* to extend the application of the safe harbour scheme to include entities providing network access and online services.

The Attorney-General's Department has considered representations made to the *Review of the Scope of Part V Division 2AA of the Copyright Act (2005)* and the *Digital Economy Future Directions Consultation Paper (2009)* in developing the proposal contained in this consultation paper concerning extension of the safe harbour scheme.

The proposal set out in this consultation paper does not represent the Government's final position on this matter. Interested parties are encouraged to contribute their views and any other relevant information that may assist the Government in taking the most appropriate action.

We would encourage those who have a view on the issues outlined in this consultation paper to make a written submission by 22 November 2011. Submissions should be sent to:

Business Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Alternatively, electronic submissions can be forwarded to copyright@ag.gov.au

Submissions received may be made public on the Attorney-General Department's website unless otherwise specified. Persons providing a submission should indicate whether any part of the content should not be disclosed to the public. Where confidentiality is requested, submitters are encouraged to provide a public version that can be made available.

LIMITATION ON REMEDIES AVAILABLE AGAINST CARRIAGE SERVICE PROVIDERS UNDER THE SAFE HARBOUR SCHEME

In 2006, the *Copyright Act 1968* was amended to provide a scheme offering legal incentives for Carriage Service Providers (CSPs) to cooperate with copyright owners in deterring copyright infringement on their networks. The scheme is commonly referred to as the 'safe harbour scheme' and limits the remedies available against CSPs for copyright infringements that take place through their systems and networks that they do not control, initiate or direct.

Application of the safe harbour scheme is not automatic. In order for a CSP to enjoy the protection provided by the safe harbour scheme, certain conditions applicable to the particular category of activity provided by the CSP must be satisfied[1].

The scheme covers the following four categories of activities that may be provided by CSPs:

- Category A – acting as a conduit for internet activities by providing facilities for transmitting, routing or providing connections for copyright material
- Category B – caching through an automatic process
- Category C – storing copyright material on their systems or networks, and
- Category D – referring users to an online location (for example, linking).

The definition of 'carriage service provider'

Currently, the safe harbour scheme can only apply to CSPs as defined under the *Telecommunications Act 1997*. At the time the safe harbour scheme was introduced, this definition was adopted from the Telecommunications Act because it was considered to be a suitable and technologically neutral term.

The definition contained in the Telecommunications Act provides that a CSP is a person that supplies a listed carriage service to the public using a network unit owned by one or more carriers, or a network unit that has a nominated carrier declaration. Importantly, to fall within the definition, an entity must be operating primarily as a provider of network access to the public. While the definition is appropriate for the purposes of the Telecommunications Act, there are limitations in its application to the Copyright Act.

Issues for some providers of internet access and online services

Entities providing services that fall within the four categories prescribed, cannot take advantage of the safe harbour scheme unless they provide network access 'to the public'. A range of organisations and businesses operate servers to provide internet access to their clients, customers, students and other users, but not to 'the public'. These entities activities fall within the Category A activity, but they are excluded from the definition of a CSP.

Similarly, online search engines, bulletin board operators and online vendors conduct Category D activities. They are also excluded from the definition of a CSP as they are not 'providers of

[1] These conditions are set out in the table contained in section 116AH of the *Copyright Act 1968*.

network access' and therefore not eligible for the safe harbour scheme. However, these providers of internet access and online services face similar problems to CSPs regarding the lack of control over the actions of their users. As a result, these entities face similar liability issues to CSPs in relation to infringements occurring through the services they provide.

Expanding the scope of the safe harbour scheme

The Australian safe harbour scheme was implemented pursuant to the Australia-United States Free Trade Agreement. A number of other countries, in particular, Singapore and Korea, have also implemented safe harbour schemes that have allowed a broad range of entities in those countries to take advantage of the limitation on remedies available for copyright infringement occurring on their networks.

In the United States, the courts have determined that, for the purposes of the US scheme, the term 'service provider' includes an internet service provider acting as a conduit for peer-to-peer file sharing programs[2], providers of the software and operators for instant messaging services[3], internet service providers that provide subscribers with news groups[4] and online vendors[5]. This extends the application of the scheme beyond entities responsible merely for providing the infrastructure for the internet.

The Singaporean safe harbour scheme closely resembles the US safe harbour scheme. Both schemes provide a two-tiered definition for 'network service provider' and 'service provider' respectively, which include providers of online services or operators of facilities providing online services or network access. However, in circumstances where entities are simply involved in transferring information which is not stored on the provider's networks, Singapore provides a more limited definition of 'network service provider' to be specific to the conditions to be satisfied for this activity in order for the entity to enjoy limited liability under the safe harbour scheme.

The Korean copyright law contains a safe harbour scheme for entities that provide network access and online services. The Korean definition of 'online service provider' appears to be broader in scope than the relevant definitions provided by the US and Singapore. The definition includes persons providing others with services that reproduce or interactively transmit works, etc. through information and telecommunications networks (which includes information and communications systems, under which telecommunications infrastructure are employed, or the telecommunications infrastructure, computers, and software are used together for gathering, storage, processing, searching, transmission and reception of information).

It is apparent that the current definition of 'carriage service provider' gives the Australian scheme a more restricted scope than equivalent safe harbour schemes in the US, Singapore and Korea. The approach these countries have taken in implementing the safe harbour scheme has been taken into consideration in developing the proposal to amend the Australian scheme.

Following the consideration of similar international schemes, and the representations made by interested parties during targeted consultation conducted by the Attorney-General's Department in 2005, and again in response to the Government's *Digital Economy Future Directions Consultation Paper 2009*, it is now proposed that the scope of safe harbour scheme in the Copyright Act be amended to cover a broader range of service providers.

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[2] *Recording Industry Association of America, Inc v Verizon Internet Services, Inc.* 351 F.3d 1229
[3] *In re: Aimster Copyright Litigation* 334 F.3d 643
[4] *ALS Scan, Inc. v Remarq Communities, Inc* 239 F.3d619
[5] *Corbis Corporation v Amazon.com, Inc* 351 F.Supp.2d 1090

To achieve this, an alternative term ('service provider') would replace 'carriage service provider' for the purposes of the safe harbour scheme. The new term would be defined to cover internet service providers and operators of online services, irrespective of whether they provide a carriage service to the public. The new term would be consistent with the Australia-United States Free Trade Agreement and comparable international approaches. Careful consideration will be given to developing a definition that it is simple and effective, technologically neutral, and consistent with Australia's international obligations.

The definition below is provided as an example of a possible approach to address the issues discussed above. The definition does not represent a final or favoured form of words. It is suggested only for the purposes inviting comments to inform the drafting of a definition.

A person who provides services relating to, or provides connections for, the transmission or routing of data; or operates facilities for, online services or network access, but does not include such person or class of persons as the Minister may prescribe in the Regulations.

Submissions are invited on the scope and structure of the above definition. Interested parties are encouraged to provide comments on whether the definition would adequately and appropriately expand the safe harbour scheme or how it might be improved.

The expanding scope of the safe harbour scheme is not intended to alter the existing balance of the scheme. Eligibility will continue to be determined by optional adherence to the conditions prescribed for each of the four separate categories of CSP activity.