UNIVERSITIES AUSTRALIA

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Submission in response to the Online Copyright Infringement Discussion Paper

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Introduction

Universities Australia welcomes the opportunity to comment on the Government's Online Copyright Infringement Discussion Paper. Australian universities provide Internet access to more than one million students and more than 50,000 academic staff. Provision of Internet access is essential to a university's role as an education provider and research institution. The proposals outlined in the Government's *Online Copyright Infringement Discussion Paper* have the potential to affect the liability of entities providing Internet access and copying facilities to others and so they are of particular interest to universities.

Universities Australia will specifically comment on two matters: the proposed extension to authorisation liability; and the proposed expansion of the copyright safe harbours.

We strongly welcome the expansion of the copyright safe harbour scheme contained in Division 2AA, part V of the Copyright Act (*the Act*) to include any service provider engaged in one of the activities set out in ss 116AC to 116AF of the Act. The current exclusion of universities from the existing safe harbour regime is an anomaly that has no justification in policy, and that puts Australian universities in a less advantageous position than their counterparts in the USA, notwithstanding that the Australian safe harbours were based on those contained in the US Digital Millennium Copyright Act (DMCA).

We are, however, greatly concerned by the proposal to "extend" authorisation liability as a means of addressing online piracy. The proposed changes would not, as the Discussion Paper appears to anticipate, apply only to commercial ISPs. They would, if implemented, also extend to universities and others entities that provide Internet access on a non-commercial basis for publicly beneficial purposes.

We acknowledge and support the Government's desire to address online piracy. However, we strongly urge the Government not to seek to achieve this in a way that would affect universities. Amending the law of authorisation as proposed would:

- potentially expose Australian universities to a significantly greater risk of being sued by rights holders for infringements made by students or staff who use university facilities and IT systems;
- result in universities being subjected to costly and onerous administrative obligations; and
- potentially put universities in conflict with their obligations to students.

This would severely affect universities' ability to educate students and support research. This is not in the public interest.

Universities Australia is a member of the Australian Digital Alliance (ADA) and we endorse their commissioned paper by Dr Rebecca Giblin of Monash University entitled *Authorisation in Context: Potential consequences of the proposed amendments to Australian secondary liability law.* The paper can be found here.

Universities as service providers in a digital environment

Modern universities must have large, sophisticated information technology facilities to support education and research across multiple campuses, as well as thousands of students and staff learning and teaching in a range of flexible learning environments. These facilities necessarily

include the ability to access and use the Internet via university servers and other university IT infrastructure. This is essential to the core mission of universities. For universities to continue to pursue excellence and remain competitive in a global education market they must be able to continue to make innovative and efficient use of information technology and the Internet. Just a few examples of this include:

- Providing staff and students with Internet access - including via Wi-Fi - for educational purposes;
- Providing remote or cloud-based digital storage to staff and students for educational purposes;
- Providing IT facilities that are used by staff and students to engage in legitimate use of file-sharing software for educational purposes. (The original use of this kind of software was to facilitate sharing of large volumes of data between researchers); and
- Providing facilities that can be used to copy content for educational purposes.

For each of these activities, universities are potentially exposed to authorisation liability for copyright infringements by staff and students. While there is nothing new about this, the potential liability today is much greater than it was in the past when students were using photocopying machines to make a 'hard' copy.

Australian universities are at greater risk of authorisation infringement than their US counterparts

Australian universities are currently at a greater risk than universities in the USA of being found to have authorised student infringement of copyright. This is because universities in the USA have two exceptions that are not available to Australian universities.

First, students in US universities can rely on the fair use exception contained in the US Copyright Act to undertake activities that in many cases would amount to an infringement of copyright in Australia, such as data mining or text mining. Secondly, US universities have the benefit of exceptions to the anti-circumvention regime that are not available to Australian universities. One such exception enables US students to circumvent a technological access control measure on DVDs for educational purposes.[1]

If an Australian student were to use university facilities and systems to carry out these same activities, the university would potentially be exposed to liability for authorising infringement.

Universities currently adopt a wide range of approaches to prevent their systems being used to infringe copyright. Every Australian university has policies in place that are designed to prevent use of its facilities and IT systems for copyright infringement. These include policies that require staff and students to agree to and comply with terms that prohibit the use of university systems

[1] See US Copyright Office 2012 DMCA Anti-Circumvention Exemptions Rulemaking Final Rule

to infringe copyright. Sanctions are imposed on staff members or students who breach these terms. Importantly, however, each university develops and applies approaches that are appropriate to its own particular IT facilities and systems: there is no "one size fits all" approach to preventing infringement.

Universities are also actively involved in educating staff and students about copyright issues. These steps are not just a matter of risk management: universities have a strong commitment to promoting a culture of respect for copyright among their staff and students. Some examples of how universities (and the peak body, Universities Australia) promote copyright compliance are:

- running copyright workshops for new academic staff as part of their induction and on a regular basis;
- employing copyright officers to oversee copyright training and compliance;
- library-based copyright training for students; and
- sector-wide copyright workshops attended by university copyright officers.

Universities Australia submits that the policies, processes and training that universities have put in place to manage copyright have been largely effective in preventing misuse of their systems. We do not suggest that university systems are never used to infringe copyright: it is inevitable that the provision of Internet access to over a million students will result in some instances of infringements occurring. We do, however, submit that the concerns outlined in the Discussion Paper regarding widespread online copyright infringement do not apply to universities. It has now been more than a decade since rights holders have taken legal action against universities with respect to allegedly unlawful file-sharing activities occurring on university systems.[2] This is testament to the steps that universities have taken to prevent these activities from occurring. There is simply no policy rationale for including universities in any reform initiative that is intended to encourage commercial ISPs to do more to address online piracy.

The proposed "extension" of authorisation liability

The Discussion Paper proposes to "extend" the law of authorisation. It appears that this would be done by amending ss 31(1) and 101(1) of the Act to:

- effectively downgrade the importance of any power to prevent the infringing act in the assessment of whether a person took reasonable steps to prevent the infringement;
- direct a court to have regard to "relevant industry schemes or commercial arrangements" when determining whether a person took reasonable steps to prevent the infringement; and
- direct a court to have regard to any measures prescribed in the Copyright Regulations when determining whether a person took reasonable steps to prevent the infringement.

As the Discussion Paper itself notes, ss 31 and 101 are technology neutral. Any changes to these provisions would therefore not be confined to ISPs. They would apply to any entity providing services and facilities that could be used by another person to copy or communicate, and would therefore apply to universities.

[2] In 2004, a number of record companies sought preliminary discovery against three Australian universities seeking evidence of alleged file sharing by students: Sony v University of Tasmania [2003] FCA 532.

Under the existing law of authorisation, universities and other service providers are required to take reasonable steps to ensure that systems that they provide to students and others are not used to infringe copyright. In the event that a service provider is sued, it is a matter for the court to decide whether it did in fact take reasonable steps to prevent infringements from occurring.

The Discussion Paper suggests that the intention of the proposed changes is to encourage industry to reach agreement on what would amount to such "reasonable steps". We are concerned that the changes outlined could have at least the following impact on universities:

- First, universities currently adopt a wide range of appropriate approaches to prevent their systems from being used to infringe copyright. Each university is best placed to determine the approaches that are suited to its own environment. In the event that a university was sued for allegedly authorising a student's infringement, it would be a matter for the court to determine whether the steps taken by the university were reasonable in the circumstances. It is also the case that what is "reasonable" will change over time and in line with technological developments.

  If implemented, the proposed changes to the authorisation provisions may lead to "industry schemes or commercial arrangements" that impose inflexible, unreasonable, and costly obligations on universities in place of the nuanced approach to determining liability that exists at present. These new obligations would have to be met if a university was to be found to have acted 'reasonably' to avoid student infringements.

  This could expose universities who were not in a position to comply with such obligations to a greater risk of liability, even though they might already be acting reasonably to prevent infringements. Through the imposition of unnecessary and costly compliance regimes, universities could be saddled with onerous obligations that are inappropriate to a non-commercial environment, thereby diverting scarce public resources away from a university's core mission of teaching and research. We note that the Attorney-General, the Hon Senator George Brandis QC, has been reported as suggesting that service providers should share the cost of any new regimes imposed to address online copyright infringement.

- Secondly, in determining what sanctions can or should reasonably be imposed on students found to have used university systems to infringe copyright, a university must inevitably have regard to the educational consequences for a student whose university account is suspended or terminated. While this is entirely appropriate, the question of what is "reasonable" to avoid copyright infringement will be based on the facts of the individual circumstances.

  If implemented, the proposed changes may lead to the development of industry schemes, or commercial arrangements that would require a university to adopt an inflexible, "three-strikes" approach in order to satisfy the requirement of taking "reasonable steps" to avoid infringement. This could place universities in a position of direct conflict with their obligations to students. Suspension or termination of a student's IT account is an extreme step that could prevent the student from engaging in activities that are an essential requirement for the course of study in which the student is enrolled. The question of whether it was unreasonable - in the particular circumstances of a case - for a university to decline to take this step should properly remain a matter for a court. The provision outlined in the Discussion Paper would remove the flexibility and nuance that is such an important aspect of the current law of authorisation, and

replace it with an inflexible list of factors that a court would be required to take into account when determining liability. This would potentially expose universities to a significantly increased risk of liability.

- Thirdly, changes to authorisation law that expose universities to greater legal risk, administrative burden and/or cost may cause some universities to adopt risk-management approaches that restrict the use of new and innovative digital technologies. This would clearly serve to impede the capacity of universities to undertake new research, compete in an international education market and evolve and innovate using modern technologies.

Australian universities have a proven track record of taking all appropriate steps to ensure their systems are not used to infringe copyright. There would be absolutely no potential deterrent factor in imposing greater legal risk, and/or more onerous obligations, on universities.

Universities Australia fully appreciates the desire of the Government to address online copyright infringement. However, we do not consider that extending the law of authorisation is an appropriate way to achieve this. Quite apart from the potential impact on universities, we are also concerned that the proposed changes to the authorisation provisions have the potential to make the operation of cloud-based services more legally risky and more costly. As with universities, these services make facilities available that enable third parties to copy and communicate content, and would therefore be affected by any "extension" of authorisation liability. We are not aware of any policy arguments that would justify such a broad expansion of liability for these services.

Universities Australia believes that copyright reform should facilitate the use and development of innovative digital technologies, not impose unnecessary cost, risk, and burden that would impede the application of cutting edge digital technologies in higher education and make Australia a less attractive environment for investing in digital technologies.

Extension of the copyright safe harbours

Universities Australia strongly welcomes the proposed expansion of the copyright safe harbours to include universities and other online service providers. We have advocated for this reform for many years and made submissions to this effect in response to the Government's 2005 *Review of the Scope of Part V Division 2AA of the Copyright Act*, the 2009 *Digital Economy Future Directions Consultation Paper*, and the Government's 2011 *Consultation Paper on Revising the Scope of the Copyright 'Safe Harbour Scheme'.*

Even under the law of authorisation as it currently operates, the extremely large volume of Internet traffic carried by universities makes them particularly vulnerable to actions by copyright owners in respect of alleged infringing conduct by staff and students using university IT systems. Universities Australia submits that it is entirely appropriate that universities be extended the same protection as is currently afforded to commercial ISPs.

Universities Australia has stated in previous submissions that a simple and workable means of expanding the safe harbours would be to replace the term "carriage service provider" where used in Part V Division 2AA of the Act with the term "service provider" as used in the DMCA (on which the Australian safe harbour provisions were intended to be based), and to define that term in section 10 of the Act in the same terms as in the DMCA:

> "A person who provides services relating to, or provides connections for, the transmission or routing of data; or provides or operates facilities for online services or network access."

The Discussion Paper has proposed a slightly different approach by replacing references to "carriage service provider" with a reference to "service provider", and defining service provider as:

> "Any person who engages in activities defined in sections 116AC to 116AF".

The approach outlined in the Discussion Paper would achieve the same purpose as the approach we suggested in 2011, and would ensure that universities engaged in any of the activities set out in those sections would be in a position to claim the benefit of the relevant safe harbour provided that they complied with the relevant conditions.

As stated in our 2005 and 2011 submissions, Universities Australia believes it appropriate to include a provision similar to sub-section 512(e) of the DMCA for the benefit of not-for-profit educational institutions. Under sub-section 512(e) of the DMCA, a faculty member or a graduate student employee performing a teaching or research function is considered "a person other than the service provider". This means that the institution can take advantage of the safe harbours in relation to transitory communications or system caching (analogous to Category A and B activities in Australia, defined in sections 116 AC and AD), regardless of the activities of its staff or student employees. In relation to the US safe harbours for storing activities and information location tools (analogous to Category C and D activities in Australia, defined in sections 116 AE and AF), the faculty member or student employee's knowledge or awareness of his or her infringing activities will not affect the institution's ability to use the safe harbours in certain circumstances.

In light of the history and intent of the safe harbour provisions, which are modelled on the DMCA safe harbours, it would be anomalous if Australian educational institutions were treated less favourably than their US counterparts and if the potential liability associated with their Australian campuses was greater than those for their US campuses.

Finally, we are aware that some rights holder groups have argued that there should be a trade-off between receiving the protection of the safe harbours and being subject to extended authorisation liability. In other words, if universities and other service providers are to be brought within the safe harbours, it is appropriate to subject them to stricter authorisation liability. There is no policy justification for this. The safe harbours were never intended to operate as a *quid pro quo* for being subject to authorisation liability. They were intended to provide certainty and limited financial liability for service providers that complied with the safe harbour conditions. This protection would only be needed if the service provider was *prima facie* liable for authorising user infringements. If the bar to being *prima facie* liable is lowered - by extending authorisation liability as proposed - Australian universities, and other service providers, would be placed in a worse position than their counterparts in the US and comparable jurisdictions that have had the benefit of robust, flexible safe harbours for many years without being exposed to extended authorisation liability.

Universities Australia is available to meet to discuss any elements of this submission.