SUBMISSION IN RESPONSE TO THE CLOUD COMPUTING REGULATORY STOCK TAKE

DECEMBER 2014
ABOUT THE AUSTRALIAN COPYRIGHT COUNCIL

The Australian Copyright Council (ACC) supports a creative Australia by promoting the benefit of copyright for the common good.

We believe in the values copyright laws protect: creative expression and a thriving, diverse, sustainable, creative Australian culture. A society's culture flourishes when its creators are secure in their right to benefit from their creative work and when access to those creative works is easy, legal and affordable. Copyright effectively and efficiently enables this balance between protection and access.

The ACC is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia’s creative industries and Australia’s major copyright collecting societies.

We are advocates for the contribution of creators to Australia’s culture and economy and the importance of copyright for the common good. We work to promote understanding of copyright law and its application, lobby for appropriate law reform and foster collaboration between content creators and consumers.

We provide easily accessible and practical, user-friendly information, education and forums and pro bono legal advice on Australian copyright law for content creators and consumers.

The ACC has 24 member organisations. A full list of our members is attached at Appendix 1.
INTRODUCTION

In May this year the Department of Communications published its Cloud Computing Regulatory Stock take. Chapter 1 of the Stock take deals with Competition and Copyright. The issues dealt with in that chapter have also been canvassed in other inquiries, notably the Australian Law Reform Commission’s (ALRC) Inquiry into Copyright and the Digital Economy, the House of Representatives Standing Committee on Infrastructure and Communications’ IT Pricing Inquiry and, by the Harper Panel, as part of the review it is currently conducting on Competition Law and Policy. The Department has welcomed feedback from stakeholders. The Australian Copyright Council (ACC) would like to take this opportunity to respond to the question that is posed about the impact of copyright law on cloud computing and to put on record its submissions to the ALRC and the Harper Panel.

Are existing copyright laws impacting on the Australian cloud services market? How could any issues best be addressed?

The first part of this question replicates a question asked by the ALRC in the Issues Paper it published as part of its inquiry into Copyright and the Digital Economy. In an effort to assist the ALRC, many stakeholders spent a great deal of time compiling evidence of cloud-based systems operating in Australia. For example, the ACC compiled an Appendix detailing the wide range of cloud-based services operating in Australia at that time. The submissions of ARIA and APRA|AMOCS also provided examples of the broad range of cloud-based music services.\(^1\) In the intervening two years, cloud services have continued to proliferate in Australia. For example, in August this year, a Digital Content Guide was launched, listing the many sources of licensed digital content in Australia.\(^2\) Rarely a week goes by without the announcement of a service being launched in Australia. In our submission, there is little to support the view that copyright law is impacting on the Australian cloud services market.

The Stock take refers to the *Optus TV Now*\(^3\) decision as an example of where copyright law has impacted cloud computing in Australia. Indeed, some have suggested that the introduction of a fair use exception, as recommended by the ALRC would support innovation and, in particular, the development of cloud-based technologies. Another way of looking at the *Optus* decision is that the Court found (correctly) that the TV Now business model required a copyright licence. In our submission, the recent *ABC v Aereo* decision in the Supreme Court of the United States demonstrates that a fair use defence will not eliminate questions about copyright law and its impact on cloud computing.

As Giblin and Ginsburg have observed Recent judicial interpretations of U.S. copyright law have prompted businesses to design technologies in ways that enable the making and

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\(^3\) *NRL Investments P/L v Singtel Optus P/L* [2012] FCAFC 59.

\(^3\) *NRL Investments P/L v Singtel Optus P/L*
transmission of copies of works to consumers while falling outside the scope of the owner's exclusive rights.\textsuperscript{4}

The authors go on to say that it is undesirable for legal outcomes to depend so heavily on technical design. It is difficult to disagree with this observation. However, in our submission, current Australian copyright law articulates the policy intention clearly. Individuals have the benefit of certain exceptions for their private use. Commercial entities should seek a licence. For businesses engaged in content distribution, this is simply a cost of doing business. It should not be viewed as an impediment to cloud computing any more than the supply of electricity.

As the US Government noted in its amicus brief in the Aereo case, the finding that Aereo was infringing need not have implications for cloud-based technology.\textsuperscript{5} For example, a service such as Dropbox is likely to rely on express or implied licenses from its users. And it certainly seeks broad warranties and indemnities in relation to copyright as part of its terms and conditions. This happens outside any exceptions for private use that might exist in Australian copyright law or under the US fair use doctrine.

We note that the Government is currently considering the ALRC’s fair use recommendation. In our submission, there is little to suggest that copyright law is having an inappropriate impact on cloud computing in Australia or that adoption of a fair use exception in Australian law would increase innovation in cloud computing.

As far as the Stock take deals with issues related to competition, copyright and international price discrimination, we draw the Department’s attention to our submissions to the Harper Panel.\textsuperscript{6}

Please do not hesitate to contact us should you wish to discuss any matters raised in this submission.

Fiona Phillips
Executive Director


\textsuperscript{5} http://www.scribd.com/doc/210376634/13-46tsacUnitedStates

Appendix 1: Australian Copyright Council Affiliates

The ACC’s views on issues of policy and law are independent, however we seek comment from the 24 organisations affiliated to the Council when developing policy positions and making submissions to government. These affiliates are:

Aboriginal Artists Agency
Audsance
Australian Commercial & Media Photographers
Australian Directors Guild
Australian Institute of Architects
Australian Institute of Professional Photography
PAustralian Music Centre
Australasian Music Publishers Association
Australian Publishers Association
APRA|AMCOS
Australian Recording Industry Association
Australian Screen Directors Authorship Collecting Society
The Australian Society of Authors Ltd
Australian Writers’ Guild
Christian Copyright Licensing International
Copyright Agency
Media Entertainment & Arts Alliance
Musicians Union of Australia
National Association For The Visual Arts Ltd
National Tertiary Education Industry Union
Phonographic Performance Company of Australia
Screen Producers Australia
Screenrights
Viscopy