



Assistant Secretary
Business Law Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
Barton ACT 2600

Via email to: copyright@ag.gov.au

27th April 2012

Dear Assistant Secretary,

Re: Proposed Draft Terms of Reference for the ALRC Review of the Copyright Act

Electronic Frontiers Australia (EFA) appreciates the opportunity to make this submission in relation to the Proposed Draft Terms of Reference for the Australian Law Reform Commission's Review of the operation of the Copyright Act in the digital environment.

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with on-line freedoms and rights.

EFA believes that the current form of the Copyright Act no longer provides a defensible balance between providing protection for rights-holders, providing scope for innovation in technology and services and allowing the public to access information legally in the manner that suits them best. EFA therefore commends the Attorney-General for commissioning this review of the Act.

Rather than restricting the review to examining a series of exceptions, designed to address specific uses, EFA believes that a more holistic approach is appropriate. This should include consideration of a broader, flexible concept of fair dealing, which, subject to certain defined criteria, should ensure that new technologies and other innovations are not unnecessarily stifled by uncertainty about their legal status. EFA believes that the law should remain as technology-neutral as possible and asserts that a fair dealing approach such as this is likely to be the most appropriate manner for achieving such neutrality.

The omission of the fair dealing doctrine in the incorporation of the United States' Digital Millennium Copyright Act in the Australia - US Free Trade Agreement has been demonstrated to be causing problems to a wide range of parties. EFA therefore believes that the doctrine of fair dealing needs to be included in the Copyright Act, as the narrowly-defined and technologically-specific exemptions are already out of date. A general principle is needed to maintain the effectiveness and credibility of the Act.

EFA notes today's judgement of the full bench of the Federal Court relating to the "private and domestic use" exception (s111) in National Rugby League Investments Pty

Limited v Singtel Optus Pty Ltd. EFA believes that the legal uncertainty surrounding this case provides a timely and very pertinent example of the case for a flexible right of fair dealing.

EFA therefore recommends that the terms of reference be broadened to consider a technology-neutral concept of fair dealing that could have wide applicability and minimise the need for regular amendments to the Copyright Act to cater for each new technological innovation. Specifically, EFA recommends that issues relating to cloud-based computing services be given particular attention during the review process.

EFA is also concerned that the terms of reference refer to 'Australia's international obligations, including any existing or proposed international obligations', given particularly that the negotiations in relation to the Trans Pacific Partnership Agreement are being undertaken in secret, and that the Anti-Counterfeiting Trade Agreement (ACTA) is yet to be ratified by Australia.

EFA therefore recommends that 'including any existing or proposed international obligations' be deleted from that sentence.

EFA thanks the Attorney-General for commissioning this review and looks forward to the opportunity to be involved in consultations with the ALRC during the review process.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'David Cake', is centered on the page. The signature is fluid and cursive, with the first name 'David' and the last name 'Cake' clearly distinguishable.

David Cake
Chair, Electronic Frontiers Australia